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No. 08 953

In The

# Supreme Court of the United States

TERRANCE ROLLAND,

*Petitioner,*

vs.

TEXTRON, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. In an action under the Employee Retirement Income Security Act ("ERISA") for breach of fiduciary duty by willful and intentional misrepresentation by the fiduciary of the contents of an ERISA welfare plan, is the plaintiff-participant entitled to a jury trial?

2. If an employee has no remedy under ERISA for willful and intentional misrepresentation by his employer of the contents of an ERISA welfare plan, because it is found that the employer in making the misrepresentation was not acting in a fiduciary capacity, does ERISA pre-empt a state law fraud claim by the employee against his employer, leaving him with no remedy in any forum?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are all named in the caption hereof.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Terrance Rolland, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Eleventh Circuit in this matter was not selected for publication in the Federal Reporter. It can be found as *Rolland v. Textron, Inc.*, at 2008 WL 4874463 (11th Cir. 2008). A copy of the opinion is included in the Appendix submitted with this petition, together with a copy of the district court decision which the Court of Appeals reviewed, which has not been published in the Federal Supplement but which may be found as *Rolland v. Textron, Inc.*, at 2008 WL 858887 (S.D.Ga. 2008). The Appendix also includes a copy of the district court's opinion denying summary judgment to Respondent.

## STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain the writ of certiorari sought under 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Eleventh Circuit was issued on November 12, 2008.

No petition for rehearing or for rehearing en banc was filed.

## STATUTORY PROVISIONS INVOLVED

Question 1 involves the construction of the Seventh Amendment to the Constitution of the United States, in pertinent part as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Question 2 involves the construction of 29 U.S.C. § 1144(a), a portion of the Employee Retirement Income Security Act ("ERISA"), in pertinent part as follows:

> 29 U.S.C. § 1144 – Other Laws
>
> Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

## STATEMENT OF THE CASE

Petitioner brought this action in the federal district court, pleading alternatively under ERISA and under state law. Petitioner alleged in pertinent part that Respondent, his employer, had willfully and intentionally misrepresented to him and other employees, in writing and orally, that hourly workers such as himself were covered by long-term disability provisions of Respondent's ERISA welfare benefit plan.

The district court ruled before trial that Petitioner's alternative state law claim for fraudulent misrepresentation was pre-empted by ERISA. The district court further found that there was a genuine issue of material fact which precluded summary judgment to Respondent on Petitioner's ERISA claim for breach of fiduciary duty through fraudulent misrepresentation. It dismissed Petitioner's jury demand.

The district court held a non-jury trial and made extensive findings of fact. The district court disbelieved Petitioner's evidence, found that Respondent's written representation to Petitioner that Petitioner was covered for long term disability benefits was a mere error, and entered judgment for Respondent. As another basis for judgment, the district court also found that in making its representations, Respondent did not act in a fiduciary capacity so that Petitioner had no claim under ERISA.

Petitioner appealed, arguing that on his claim under ERISA for willful and intentional fraudulent misrepresentation, both oral and written, Petitioner was entitled to a jury trial by the Seventh Amendment to the United States Constitution, and further that if Respondent made its representations while not acting in a fiduciary capacity, as found by the district court, so as to preclude a remedy under ERISA, then ERISA did not preempt his claim for fraudulent misrepresentation under state law. The Court of Appeals for the Eleventh Circuit rejected both contentions.

## REASONS FOR GRANTING THE WRIT

The first question presented is one of grave constitutional significance, involving the Seventh Amendment right of jury trial, which has not been decided by this Court. Blanket statements by the courts of appeals that a right to a jury trial never exists under ERISA are contrary to the rationale of recent decisions of this Court and to the procedure established by this Court in analyzing the applicability of the Seventh Amendment to a claim which did not exist at the time of enactment of the United States Constitution.

The second question presented concerns the scope of ERISA preemption of state law. The expansive view of preemption employed by the appellate court below in this case results in substantial injustice, which is

likely to be repeated, and a finding that federal law has completely preempted state law without providing any alternative remedy. There is no basis in the statute or congressional intent for such a conclusion. Other federal courts of appeal have found no preemption in similar cases. The state of ERISA preemption law in this regard is confused and unsatisfactory.

**1. The Court of Appeals erred in denying a jury trial to Petitioner on his ERISA claim.**

It cannot be said that there is disagreement among the federal courts of appeal on this issue, since all federal courts of appeal which have considered jury demands in ERISA have rejected them. *Liston v. Unum Corporation Officer Severance Plan,* 330 F.3d 19, 24 (1st Cir. 2003) (cases collected). However, the First Circuit, recognizing some of the district court decisions that have found in favor of a right of jury trial, has specifically reserved the question. *Recupero v. New England Tel. & Tel. Co.,* 118 F.3d 820, 831 (1st Cir. 1997).

Petitioner does not question that many cases, no doubt the great majority, under ERISA are properly equitable ones in which no jury is required. This would involve most cases for payment of benefits, which will turn on the interpretation of a plan, a matter as to which most fiduciaries have been granted discretion, or the qualification of a particular beneficiary for a particular benefit, as to which fiduciaries are also generally granted discretion under

their plan documents. Petitioner challenges the broad rule upon which the courts of appeal have acted, that any ERISA action, being "equitable" rather than "legal", is disqualified without further analysis from the protection of the Seventh Amendment.

Specifically, a claim by an employee that he was induced to work for an employer/fiduciary because of intentional misrepresentation of the coverage of a welfare benefit plan, is one in which the employee is entitled to the protection of the Seventh Amendment. In the present case, no issue of interpretation of the plan is involved. Petitioner claims, and has credible evidence, both written and oral, to support his claim, that Respondent represented to him and to other employees that it offered long term disability benefit coverage to hourly employees, when in fact it did not offer such coverage and knew that it did not.

As it was tried after the district court dismissed all other claims, this was an action for breach of fiduciary duty based on active fraud. The claim was based not on mismanagement or negligence, but rather on intentional misrepresentation of the scope of coverage under the plan. Although ERISA did not exist at the time of the adoption of the Seventh Amendment to the United States Constitution, nevertheless the claim tried below is most closely analogous, both in the nature of the claim and in the relief sought, to an action for common law fraud against a trustee.

At common law, in the 18th century and now, a charge of fraud of this nature against a trustee was and is a legal action as to which the parties were and are entitled to a jury. Neither the fact that the plaintiff was a beneficiary of the trust nor the fact that the fraud was a breach of trust would at common law have nullified the parties' right to a jury trial. ERISA should not be construed to deny it by implication. When a trust beneficiary alleges that the trustee fraudulently represented to him (contrary to fact) that he would be entitled to benefits under the trust under certain conditions, and the beneficiary properly alleges that such conditions occurred and that he relied on such an intentional fraudulent representation to his injury, the Seventh Amendment to the United States Constitution entitles him to a jury trial on this claim.

The issue here is not whether Petitioner met the terms of the plan, or what those terms mean, but rather whether the misrepresentation of the plan terms by the employer settlor was intentional and fraudulent and whether Petitioner relied on this representation to his injury. In other words, this is a classic fraud case. If it were brought by anyone other than a plan beneficiary, it would clearly be a legal claim for damages, as to which a jury trial exists as of right. If it were brought by a beneficiary against anyone other than an ERISA principal, it would likewise clearly be a legal claim for damages, entitling the plaintiff to a jury trial of right. The question is whether a beneficiary loses this right when he is

defrauded by an ERISA principal. Because it believed that ERISA necessarily displaces all state common law regarding fraud by trustees, the district court necessarily framed this case as one for breach of fiduciary duty, but the gravamen of Petitioner's claim is simply fraud.

Congress has chosen in ERISA to make all pension funds into trust-like entities of which employers or their administrators will most often serve as fiduciaries. Congress has directed that such funds shall be administered in accordance with fiduciary law principles. Congress has charged the federal courts with developing a "federal common law" of ERISA, based on the law of trusts. It has not authorized this new "federal common law" to eliminate juries where such would have been available at common law. A suit against a trustee or employer for intentionally misrepresenting the scope of coverage of a welfare benefit plan, for the purpose of obtaining services from an employee, is an action triable to a jury. Where this common law right is preempted and recharacterized by ERISA as an action for breach of fiduciary duty cannot affect the scope of the constitutional imperative of the Seventh Amendment.

In the posture of this case as it survived to trial, Petitioner did not contend that Respondent had misunderstood the plan language or that it had interpreted the language differently from the interpretation sought by Petitioner, nor did Respondent defend on the basis that it had done so. Respondent admitted that it had furnished Petitioner, and several

hundred other people, with a written notice as Petitioner claimed. Respondent simply said that the notice was issued in error. No issue of plan interpretation was involved.

At common law, a claim of fraud by a beneficiary against a trustee may have given rise in some cases, depending on the nature of the fraud, to a claim in equity, but at common law a beneficiary in such a situation also had a claim at law, not in equity.

This Court faced a similar issue in the celebrated case of *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). *Granfinanciera* underlines the importance and value of the constitutional guaranty of a jury trial in civil litigation, emphasizing that neither the existence of an elaborate scheme of Congressional regulation nor a degree of practical difficulty justifies the withholding of this right. The Court noted that the claim involved was of a type "often brought at law [as opposed to in equity] in late 18th century England" and further, and most significantly for the present case, "these actions, like all suits at law, were conducted before juries." 492 U.S. at 43, 109 S.Ct. at 2791. Once it determined that an action was "at law" at common law, this Court found its inquiry to be at an end: a jury was constitutionally required.

At common law, an action by beneficiaries against a trustee for fraud has been determined to be a legal rather than an equitable one. *Mack v. American Fletcher Nat. Bank & Trust Co.,* 510 N.E.2d 725,

736-739 (Ind.App. 1987) (statute of limitations case). Indeed, the Supreme Court of North Carolina has collected cases from several jurisdictions supporting its conclusion that a beneficiary is not limited to a suit in equity against a trustee who has mismanaged the assets of the trust, but can also bring an action for damages against the trustee. *Fortune v. First Union Nat. Bank,* 323 N.C. 146, 149, 371 S.E.2d 483, 485 (N.C. 1988). The legal nature of an action by a beneficiary against his trustee for fraud should be clear *a fortiori.* The fact that Congress has cut off any recourse against the trustee except through ERISA, and that the claim must accordingly be framed as a breach of fiduciary duty, does not change the basic nature of either the claim or the remedy.

Justice Scalia has used a case of this very type as an *a fortiori* hypothetical to show the impossibility, indeed the absurdity, of denying a jury trial. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), he makes the following highly relevant comment:

> Even if that [another cause of action] were an equitable cause of action – or, as Justice Souter asserts, a peculiar legal cause of action to which the right to jury trial did not attach – the nature of the Section 1983 suit would no more be transformed by it than, for example, *a common-law fraud action would be deprived of the right to jury trial by the fact that the defendant was a trustee who*

> *could, instead, have been sued for an equitable accounting.*
>
> – 526 U.S. at 730-731, 119 S.Ct. at 1649 (emphasis supplied)

That which Justice Scalia assumes as obvious is, in a nutshell, Petitioner's argument herein.

The issue before this Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), was whether certain fiduciaries, whose standing to bring an action was governed by Section 502(a)(3) of ERISA, were entitled to maintain an action seeking a recovery against an ERISA plan. The fiduciaries argued that they were seeking equitable relief as authorized under that subsection. This Court, however, noted that the relief they sought, which was basically a money judgment against the plan, was not equitable in nature, despite the fact that it grew out of the obligations of an ERISA plan, but rather legal. In doing so, this Court changed the analysis to be applied to the question of whether a claim seeks legal or equitable relief. Commentators have pointed out that, since this Court, at least for ERISA purposes, now classifies an action as one for "legal" or "equitable" relief on the basis of the character of the remedy sought, rather than simply concluding that all ERISA actions are equitable because they arise out of trust law, it is no longer tenable simply to conclude that ERISA automatically means no jury. For a terse and cogent explanation of this incompatibility, Petitioner respectfully refers to

Schwartz & Hack, *Supreme Court Ruling Undermines Jury Trial Ban*, 235 New York Law Journal 5 (June 15, 2006). See also Bogan, *Erisa: Re-Thinking Firestone in Light of Great-West – Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims,* 37 J. Marshall L. Rev. 629, 685-93 (2004).

Petitioner bases his suit on among other provisions, ERISA's grant to him of the right to sue "to enforce his rights under the terms of the plan", ERISA Section 502(a)(1)(B). It is the plan which creates fiduciary obligations. When a beneficiary is the victim of a fraud by his fiduciary, he is entitled to sue the fiduciary to recover his legal damages. The courts have held that, in view of the preemption of state law remedies as to an ERISA fiduciary, such a fiduciary must be sued for breach of fiduciary duty under the federal common law which the courts have been instructed to develop under ERISA. Congress never intended, nor did it provide, that somehow the right to jury trial should be lost in this process.

**2. The Court of Appeals erred when, accepting the District Court's finding that Respondent was not acting in a fiduciary capacity when it committed the acts complained of, it nevertheless held that Petitioner's state law claim against Respondent, as a nonfiduciary, were pre-empted by ERISA.**

On motion for summary judgment, the district court below found that, because Petitioner alleged a

claim against a fiduciary under ERISA law, all Plaintiff's state law claims were preempted. After trial, however, the district court found, as an alternative basis for entering judgment for Respondent, that in making its alleged misrepresentations, including its admitted written misrepresentation, Respondent had not been acting in a fiduciary capacity, and that therefore it could not be liable under ERISA even if it had made an intentional misrepresentation. The appellate court upheld this determination. In effect, the courts below have said that, regardless of whether Respondent made an intentional misrepresentation, upon which Petitioner relied to his injury, nevertheless Respondent, while not liable under ERISA because it was not acting in a fiduciary capacity in making the misrepresentation, is nevertheless immune under ERISA because all state law claims are pre-empted. If this is so, ERISA has *sub silentio* immunized employers from quite a range of tortious conduct, without any remedy whatsoever. This Court has never so held.

One would have thought that such an injustice would not lightly be imputed to Congress, to say nothing of the injury such a conclusion does to federalism. Petitioner can do no better than to refer to the discussion of this question by the United States District Court for the Northern District of Mississippi in *Moore v. Yellow Book USA, Inc.*, 343 F.Supp.2d 539, 542-545 (N.D.Miss. 2004). That court quoted the Fifth Circuit Court of Appeals in *Smith v. Texas Children's Hospital*, 84 F.3d 152 (5th Cir. 1996): "[the plaintiff's]

entitlement to benefits under [the ERISA plan] can be considered separately from the question whether [the defendant] mislead [sic] her into believing that she would be entitled to benefits under that plan; the former question requires reference to [the] plan, while the latter focuses on what [the defendant] told her." 343 F.Supp.2d at 543. After a review of available precedents, the district court reached what Petitioner submits is clearly the proper conclusion:

> Without passing judgment on Defendants' actions, surely when congress enacted ERISA it did not intend to insulate employers and insurance agents from liability for gaining greater participation by misrepresenting the scope of benefits. *See Golas v. HomeView, Inc.*, 106 F.3d 1, 8 (1st Cir. 1997): ("[i]f ERISA preempts a beneficiaries [sic] potential cause of action for misrepresentation, employees, beneficiaries and employers choosing among various plans will no longer be able to rely on the representations of the insurance agent regarding terms of the plan.").
>
> – 343 F.Supp.2d at 545.

The current state of ERISA preemption law has been well-summarized recently by the Florida Court of Appeals. *Bertoni v. Stock Building Supply,* 989 So.2d 670 (Fla.App. 2008). That court distinguishes between "complete" preemption and "defensive" preemption and discusses the elements of each, based on applicable precedents from this Court and other federal courts. Complete ERISA preemption requires

(1) that there is a relevant ERISA plan, (2) that the plaintiff has standing to sue "under that plan", (3) that the defendant is an ERISA entity, and (4) compensatory relief is sought that is similar to that afforded by Section 502(a) of ERISA. If complete preemption is not available, whether defensive preemption exists requires a consideration of (1) whether the state law invoked is a traditional exercise of state authority, (2) whether the law affects relations between principal ERISA entities, and (3) what effect the law, if it were applied and the claim thereunder upheld, would have on the plan. 989 So.2d at 674-675.

*Bertoni* involved the widow of a plan beneficiary, who sued her husband employer for negligent failure to procure supplemental life insurance based on her husband's application for such under the plan. The case having been remanded from federal court on a federal finding that the widow did not have standing to sue under the plan, the Florida court found no defensive preemption and allowed the claim to proceed under state law.

It is respectfully submitted that current law, as summarized in *Bertoni, supra,* is incomplete. Although it is a requirement of preemption that the plaintiff have standing to sue under ERISA, the courts have not similarly considered that it should also be a requirement for such preemption that there be a defendant suable under ERISA on the claim. In this case and others like it, ERISA has been interpreted improperly to foreclose actions against ERISA principals even as to acts not carried out in their

fiduciary capacity. This has created a wholly unjustified immunity for employers, who are, by this reasoning, not liable for wrongdoing as a matter of fiduciary law, if they are not "acting as fiduciaries", but also not liable for wrongdoing for acts which they commit while not acting as fiduciaries, so long as the injured parties are beneficiaries under the trust. Employees participating in an ERISA plan have less protection against tortious acts of their employers than do third persons injured by such acts.

State and federal courts have found no preemption in cases in which the application of the broad rule followed by the Eleventh Circuit Court of Appeals herein and the rules summarized in *Bertoni* would have mandated it. In *DeSantis v. Commonwealth Energy System,* 68 Mass.App.Ct. 759, 864 N.E.2d 1211 (2007), an employee sued his employer claiming that the amount of his ERISA plan pension benefits had been improperly reduced because the employer had improperly calculated certain commissions payable to him as part of his compensation. The employer claimed that ERISA preempted the claim. The Massachusetts Court of Appeals, Worcester Division, held that the claim was not preempted, because the employee's pension benefit was merely a measure of damages incidental to his state law claim for breach of contract, and there was no need for any interpretation of the ERISA plan. In the present case, as in *DeSantis,* the claim does "not require an interpretation of the plan and ha[s] no impact on the liability of the plan as an entity or on the

administration of the plan." 68 Mass.App.Ct. at 770, 1864 N.E.2d at 1220. In the present case, if the Respondent was not acting in a fiduciary capacity, as has been found, a suit against it for fraud will not have any impact on the liability of the plan as an entity, since any judgment will be a personal judgment against Respondent.

In *Southern Alaska Carpenters Health and Security Trust Fund v. Jones,* 177 P.3d 844 (Alaska 2008), an employee brought suit against his employer for negligent misrepresentation as to the scope of an ERISA plan. The Alaska Supreme Court found no preemption of the plaintiff's state law negligent misrepresentation action, noting:

> The Ninth Circuit's decision in *The Meadows* [*The Meadows v. Employers Health Insurance,* 47 F.3d 1006 (9th Cir. 1995)] is representative of a number of cases where courts have held that negligent misrepresentation claims against ERISA entities may be maintained. Often such cases involve third-party care providers who have relied on misrepresentations as to coverage made by ERISA insurers. But misrepresentation claims asserted by employees have also been allowed, especially when the employees are not plan participants or beneficiaries.
>
> – 177 P.2d at 851 (footnotes omitted).

In *Southern Alaska Carpenters,* plaintiffs were not in fact participant beneficiaries under the plan,

which was limited to union employees. Nevertheless, the terms in which the Alaska Supreme Court analyzed the issue did not depend on plaintiffs' status as nonparticipants:

> This case does not fall within the fact patterns of claims that are categorically preempted under section 514. The common law of misrepresentation is a law of general application; it does not entail any elements that make what might be regarded as a specific reference to employee benefit plans. Further, this case does not involve a claim for benefits under an ERISA plan or require the interpretation of the plan. As one court stated in an analogous situation, "[t]he existence of the Plan is not a critical factor to establishing liability because the same causes of action would exist if the Plan had never come into existence or was merely a fraudulent scheme." [citing *Smith v. Cohen Benefit Group, Inc.*, 851 F.Supp. 210, 213 (M.D.N.C., 1993)].
>
> Not only does this case not fit within the categorically barred fact patterns suggested by the case law, a number of other factors point to nonpreemption. The Joneses are not participants or beneficiaries of an ERISA plan and as such have no claim under ERISA. Preemption in this case would deny the Joneses any remedy for the harm that they suffered. Finally, and relatedly, the common law of negligent misrepresentation is an area of traditional state concern. Each of these factors points, albeit not conclusively, toward

> a conclusion that this case should not be considered preempted by Section 514.
>
> – *Id.* at 853-854.

In the above quoted passage, the Alaska Supreme Court notes that preemption has been denied "especially when the employees are not plan participants or beneficiaries", but collects cases in its footnote 11 in which preemption has been denied even though the plaintiff employee was such a participant or beneficiary and the defendant or its agent was the employer. Among these are *Smith v. Texas Children's Hospital v. Unum,* 84 F.3d 152 (5th Cir. 1996), *Wilson v. Zoellner,* 114 F.3d 713 (8th Cir. 1997), and *Smith v. Cohen Benefit Group, Inc.,* 851 F.Supp. 210 (M.D.N.C. 1993). Each of these cases determined that a state law claim by an employee against his employer would not be preempted, even though (as in the present case) his state law damages for fraud or (in the Eighth Circuit case) even merely negligent misrepresentation would be measured by reference to benefits which would have been available under the plan if the representation had been true.

In the present case, Petitioner does not argue that complete preemption exists. As to defensive preemption, two of the three factors commonly identified as relevant to a preemption analysis militate in this case in favor of no preemption. Florida's common law of fraudulent misrepresentation is a traditional exercise of state authority. Any judgment against Respondent on the state law claim would be against

Respondent individually, not against the plan, so that it would have no adverse effect on the plan. The third factor is the problematic one. A judgment against Respondent would affect relationships among principal ERISA entities, since Respondent as employer and settlor of the plan is a principal ERISA entity.

A salient consideration in current preemption analysis is whether the plaintiff has standing to sue under ERISA. Petitioner submits that existing preemption law is incomplete unless consideration is also given to whether the defendant is amenable to suit under the plan on the claim asserted. In this case, the Court of Appeals, based on the district court's finding that Respondent did not act as a fiduciary in making its admitted representation, has found that Petitioner has no ERISA remedy. This should be a significant factor in defensive preemption analysis. Although a judgment in this case for Petitioner would affect relations between Petitioner, an employee, and Respondent, his employer, both being ERISA principal entities, this one factor should not overcome the force of the other two factors commonly considered in the analysis. There is no reason to believe that Congress intended to immunize employers from suits for intentional and fraudulent misrepresentation, a matter which in this case affects neither the administration nor the interpretation of the plan, but rather only the terms of the employment relationship.

Extended reference to case law in this matter would be both superfluous and inappropriate. ERISA law has become irrational and unhinged from any

discernible congressional intent, when an ERISA principal can defend against a fraud claim by a plan participant (a member of the very class ERISA is intended to protect) on the ground that he was not acting as a fiduciary in making the alleged misrepresentation and thus is immunized from any liability for his tort, state or federal. To sustain such a defense is a very different matter from saying that, where Congress has provided a regulatory scheme equipped with specific remedies, state law remedies that would supplement this scheme are preempted. In this case there is no question of an alternative remedy or indeed any regulatory scheme at all. ERISA operates generally on fiduciaries as fiduciaries. It does not operate on employers in their nonfiduciary capacity except in situations specifically addressed in the statute. The courts below have simply held that Petitioner has no remedy, not because some alternative regulatory or administrative scheme exists for the correction or even the control of wrongs of the kind he has suffered, but because ERISA provides no means whatsoever by which Respondent's conduct can be regulated, much less remedied.

In developing a common law of remedies under ERISA, this Court has taken care to insure that the statute, contrary to congressional intent, does not become a shield for wrongdoing. See, *e.g., Varity Corp. v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 4138 (1996). Yet a commentator, after surveying the status of the law in this area, justly notes that "[r]ecent federal court decisions have shown a giant

loophole in ERISA jurisprudence, namely the way in which the preemption provision and the remedies provision interact to deny certain plaintiffs any relief, even upon a showing of a legal breach and harm." Poldrack, "*The Erisa Remedies Loophole: How Preemption and Remedies Provisions Allow Tortfeasors to Avoid Liability*", 2004 Houston Business and Tax Law Journal 463, 492. There is at least some logic in refusing a private right of action or a state law remedy to an employee where ERISA is construed to regulate and control the conduct of his employer through other means, even though the employee is not made whole or even compensated at all. There is none in refusing such a remedy where ERISA is construed not to reach the conduct complained of because the employer was acting in a nonfiduciary capacity such that his tortious actions are not within the regulatory reach of ERISA at all. The present presents the latter case.

This Court has cautioned that, although the reach of ERISA preemption is certainly expansive, it does not displace the traditional presumption against the inference that Congress has intended to preempt state law. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 654 ff, 115 S.Ct. 1671, 1676 ff, 131 L.Ed.2d 695 (1995). When a court determines in an ERISA case, as was done here, that the allegedly tortious conduct of an employer did not occur in a fiduciary capacity, it is finding, not that the employer is subject to a comprehensive scheme of federal regulation that

precludes a compensatory remedy for a plaintiff employee, but rather that the employer is not subject to such a scheme. In this case, it is not just the fact that any recovery against the employer in a state law fraud suit would be against the employer individually and not against the ERISA plan or the plan assets, that militates against a finding of preemption. It is the fact that the employer, in its nonfiduciary capacity, is not even a subject of federal regulation. In such a situation, and in the absence of expressed congressional intent, federal preemption of traditional state law remedies is neither required nor helpful in forwarding the federal regulatory scheme and should not be inferred.

## CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 08-12132
Non-Argument Calendar

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D. C. Docket No. 05-00023-CV-LGW-1

TERRANCE ROLLAND,

Plaintiff-Appellant,

versus

TEXTRON, INC.,
a foreign corporation,

Defendant-Appellee.

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Appeal from the United States District Court
for the Southern District of Georgia

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(November 12, 2008)

Before BLACK, MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

Terrance Rolland appeals the district court's judgment in favor of Textron, Inc. after a bench trial on Rolland's claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101, *et seq.* (ERISA). Specifically Rolland asserts the district

court erred in (1) denying a jury trial to him, and (2) finding Textron was not acting in a fiduciary capacity. He further asserts that if the district court was correct in determining that Textron was not acting in a fiduciary capacity, it erred in then not reinstating Rolland's state law claim.

Rolland's claim the district court erred in denying him a jury trial is meritless. It is well-settled that plaintiffs bringing ERISA claims are not entitled to jury trials under ERISA because such claims are equitable in nature. *See Broaddus v. Fla. Power Corp.*, 145 F.3d 1283, 1287 n.** (11th Cir. 1998); *Hunt v. Hawthorne Assoc., Inc.*, 119 F.3d 888, 907 (11th Cir. 1997); *Stewart v. KHD Deutz of Am. Corp.*, 75 F.3d 1522, 1527 (11th Cir. 1996). Thus, this claim is foreclosed by our prior precedent.

Rolland next asserts the district court erred in finding Textron was not acting in a fiduciary capacity. We disagree and affirm the district court' [sic] denial of Rolland's ERISA claim for the reasons stated in the district court's well-reasoned order of March 31, 2008.

Lastly, the district court did not err in failing to reinstate Rolland's state law fraud claim when it rejected Rolland's ERISA claim. Rolland's claim was properly an ERISA claim. 29 U.S.C. § 1144 provides that ERISA supersedes any and all state laws as they may relate to any employee benefit plan. "[W]here state law claims of fraud and misrepresentation are based upon the failure of a covered plan to pay benefits, the state law claims have a nexus with the

ERISA plan and its benefits system." *Variety Children's Hosp., Inc. v. Century Med. Health Plan, Inc.*, 57 F.3d 1040, 1042 (11th Cir.1995). The district court did not err in finding the state law fraud claim was preempted by ERISA, and there was no entitlement for the fraud claim to be reinstated because the ERISA claim was unsuccessful. *See Lee v. E.I. DuPont de Nemours and Co.*, 894 F.2d 755, 758 (5th Cir. 1990) ("We do not decide whether ERISA would provide relief on the facts of this case. Any remedy that does exist, however, must come from within that exclusively federal scheme of pension regulation.").

**AFFIRMED.**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION**

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| TERRANCE ROLLAND,<br>Plaintiff,<br>vs.<br>TEXTRON, INC.,<br>a foreign corporation,<br>Defendant. | *<br>*<br>*<br>*<br>*<br>*<br>*<br>* | CV 105-023 |

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**ORDER**

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(Filed Mar. 31, 2008)

Plaintiff Terrance Rolland brought the instant action against his former employer, Textron, Inc., to recover long-term disability ("LTD") benefits under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"). Plaintiff alleges that Textron misrepresented that he was entitled to LTD benefits in breach of its fiduciary duties. Defendant Textron filed a motion for summary judgment, which the Court granted in part and denied in part on August 13, 2007. Summary judgment was granted insofar as Plaintiff's state law claims were preempted by ERISA, and denied as to Plaintiff's ERISA claim. (*See* Doc. no. 61.)

The Court conducted a bench trial on the remaining claim on February 12, 2008. Prior to trial, joint stipulations of fact were submitted by the parties. (Doc. no. 62, Ex. A; Doc. no. 79.) Many, but not all, salient facts are covered by the parties' stipulations. The Court has adopted said stipulations and, as such, said stipulations are hereby incorporated into this Order as noted herein.

During argument, Plaintiff's counsel emphasized that this case ultimately comes down to the credibility of the witnesses. (*See* FTR Recording System at 10:07:46, 10:37:22.)[1] The Court agrees with counsel's emphasis on the importance of credibility assessments in this particular case. As a result, specific credibility findings are documented herein.

Having carefully considered the pre-trial and post-trial briefs, together with the testimony of the witnesses, the documentary evidence admitted at trial, and the parties' stipulations, the Court makes the following findings of fact and conclusions of law. *See* Fed. R. Civ. P. 52.

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[1] The final oral argument of March 10, 2008, has not been transcribed, but the Court is able to listen to the hearing on an audio recording system called For the Record ("FTR") and indicate the time marker of the exchange.

## I. FINDINGS OF FACT

### A. E-Z-GO and Textron

1. Plaintiff commenced his employment with E-Z-GO as a temporary press operator around October 1987. (Stip. 23.) Plaintiff became a permanent employee of E-Z-GO in early 1988.

2. E-Z-GO is an operating division of Textron, Inc., located in Augusta, Georgia. E-Z-GO primarily manufactures golf carts in the Augusta, Georgia facility. (Stip. 1.)

3. Textron's corporate headquarters are located in Providence, Rhode Island. Textron has an annual revenue of approximately $11 billion.

4. Textron has approximately 40,000 employees, located in approximately 20 countries.

5. In 2004, approximately 1,000 people were employed at E-Z-GO. Of the 1,000 employees, approximately 400 were salaried employees, and the remaining 600 were hourly employees.

6. Throughout his employment with E-Z-GO, Plaintiff worked as an hourly employee in Department 644, a fabrication shop in the production area of E-Z-GO. (Stips. 2, 4.)

7. Plaintiff was never employed as a salaried employee at E-Z-GO. (Stip. 3.)

8. The employee benefit plans at Textron were divided into two groups; a salaried plan and an

hourly plan. Hourly employees were eligible to participate in the hourly fringe benefit plan, while salaried exempt and non-exempt employees were eligible to participate in the salaried benefit plan.

9. Short-term disability ("STD") benefits were part of the benefit plan for hourly employees from at least 1989 forward. (Stip. 8.)

10. However, since at least January 2002, salaried employees were eligible for LTD benefits. The LTD benefits are governed by a LTD plan document and summary plan description ("SPD"). (Stip. 24.)

11. The LTD plan is an employer-paid, fully-insured plan. MetLife has been the insurer of the LTD plan since January 1, 2002.

12. Denise Wilson commenced her employment in E-Z-GO's Human Resources ("HR") Department in 1989, and was the HR Manager between 1991 and June 2004. (Stip. 5.)

13. Ms. Wilson's department was responsible for managing health and disability plans for employees. (Stip. 6.)

14. Since at least September 1989, when Ms. Wilson entered the HR Department, Textron has not offered LTD benefits to hourly employees.

15. There is no open enrollment process for disability benefits at Textron. Rather, employees receive the benefit automatically based upon their

employment category. That is, hourly employees are automatically enrolled in STD, and salaried employees are automatically enrolled in LTD.

16. Plaintiff received two employee handbooks while employed by Textron. Plaintiff signed acknowledgments accompanying the employee handbooks that provided:

> No oral statements or representations can change the provisions of this Employee Handbook. I also acknowledge that, except for the policy of at-will employment, terms and conditions of employment with the Company may be modified at the sole discretion of the Company with or without cause or notice at any time. No implied contract concerning any employment-related decision, term of employment, or condition of employment can be established by any other statement, conduct, policy or practice. . . . I understand that this agreement supersedes all prior agreements, understandings, and representations concerning my employment with E-Z-GO.

17. Neither employee handbook indicated hourly employees were entitled to LTD insurance. The first employee handbook listed LTD coverage for salaried employees, but did not list LTD or STD for hourly employees. (*See* Def.'s Ex. 7.) The second employee handbook did not reference LTD or STD, but it indicated that pay, if any, during leave would be determined by a person's employment category. (*See* Def.'s Ex. 8.)

**B. Plaintiff's History of STD Leave**

1. Plaintiff was absent from work as a result of his diabetes, and applied for and received STD benefits from March 31, 1997 to May 26, 1997 and from May 30, 1997 to June 30, 1997. (Stips. 14, 15.)

2. Plaintiff submitted a letter to Textron dated December 20, 1999 from one of his treating physicians, noting that he was a diabetic patient who was being treated for chronic ulceration of the right foot. (Stip. 32.)

3. Plaintiff applied for and received STD benefits as a result of a diabetic foot ulcer, indicating he was unable to return to work between May 16, 2000 and August 21, 2000. (Stips. 17, 33.)

4. Plaintiff was absent from work, and applied for and received STD benefits as a result of Charcot joint and diabetic neuropathy of his right ankle and foot between March 18, 2002 and May 22, 2002, and again from August 2, 2002 to October 1, 2002. (Stips. 17, 18, 34.)

5. In September 2003, Plaintiff received reimbursements from Textron for a brace for his right foot. (Stip. 19.)

6. Throughout 2003, Plaintiff received treatment for his diabetic condition, including his right foot. (Stip. 36.)

7. Therefore, between March 1997 and December 2003, Plaintiff applied for and received STD

benefits on multiple occasions as a result of complications from diabetes, including chronic Charcot right foot and ankle problems. (Stip. 29.) Each time Plaintiff applied for STD benefits, Textron obliged his request. Plaintiff admits that Textron never denied any of his requested STD leaves.

### C. Evidence of Plaintiff's Benefits Prior to November 2003

1. On or about February 1988, when he became permanently employed at E-Z-GO, Plaintiff signed a form concerning his insurance coverage. The February 1988 coverage form does not include or mention LTD benefits. (*See* Def.'s Ex. 6.)

2. Each year during his employment at E-Z-GO, Plaintiff signed up for certain employee benefits during an open enrollment period that occurred between October and November.

3. On December 6, 2001, Plaintiff completed an enrollment form for group insurance for the 2002 benefit year. The December 6, 2001 enrollment form does not indicate LTD coverage. (*See* Def.'s Ex. 35.)

4. In October 2002, Plaintiff completed a benefit enrollment worksheet for group insurance for the 2003 benefit year. (Stip. 7.) The October 2002 enrollment worksheet does not indicate LTD coverage. (*See* Def.'s Ex. 78.)

5. In November 2002, Plaintiff received a Confirmation Statement of his benefits for 2003. The

November 2002 Confirmation Statement does not indicate LTD coverage for the upcoming 2003 Plan Year.[2] (*See* Def.'s Ex. 79.)

### D. Outsourcing to Fidelity and Open Enrollment for Plan Year 2004

#### 1. Outsourcing to Fidelity

a. The enrollment process for Plan Year 2004 was different from previous years, as Textron was in the process of centralizing all of its North American benefit and payroll systems using Fidelity as an outside vendor.

b. Part of the centralization of benefit and payroll systems involved converting to online enrollment. In the Fall of 2003, Fidelity began conducting online enrollment for a pilot group of Textron's businesses, including E-Z-GO.

c. Textron's HR Compliance Officer, Doug Stewart, credibly testified at trial. Mr. Stewart commenced his employment at Textron corporate in 2002 and at that time was the Manager of Benefit Programs. Mr. Stewart was the project lead for the outsourcing of benefits to Fidelity.

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[2] While Defendant wants the Court to ascribe great significance to the fact that LTD was never shown on the prior enrollment or benefit documents, Plaintiff correctly points out that STD also was not shown on the prior documents.

d. Mr. Stewart testified about the outsourcing process and the roles of various entities within that process. Fidelity's role in 2003 was to conduct the annual enrollment, and Fidelity would assume the role of record-keeping services on January 1, 2004.

e. As an outside vendor, Fidelity would serve as the directed record-keeper for Textron by providing records, enrollment services, and a customer service call center for employees.

f. To facilitate the centralized benefit structure and online enrollment process, E-Z-GO's electronic and payroll benefit information was sent to the outside vendor, Fidelity.

g. Some of the information sent from Textron to Fidelity included employment data and the rules that related to benefit eligibility requirements, known as "coding rules." This data was then used to send out Personal Fact Sheets ("PFS") and Confirmation Statements to employees reflecting the benefits in which they were enrolled.

h. As part of the conversion process, Textron transmitted approximately 1,850 coding rules related to eligibility requirements alone, to Fidelity.

i. For Plan Year 2004, hourly employees at E-Z-GO made benefit elections during the open enrollment period of November 12-14, 2003, as scheduled.

j. Prior to the November 2003 open enrollment period, Plaintiff received a PFS which delineated his Plan Year 2003 benefit elections and contribution

amounts for each plan. (Pl.'s Ex. 1.) The PFS was generated by Fidelity and sent to E-Z-GO employees after receiving the data feed of employee information from Textron, including whether they were salaried or hourly employees. The PFS purportedly showed the benefits employees had prior to the open enrollment process.

k. Plaintiff's PFS erroneously indicated that he was enrolled in employer-paid salary continuation and LTD benefits, but did not indicate he was enrolled in STD. (*Id.*)

l. The PFS also provided the following language:

> The Information presented in this Personal Fact Sheet is not intended to be construed to create a contract between Textron, Inc. and any one of Textron's employees or former employees. In the event that the content of this Personal Fact Sheet or any oral representations made by any person regarding the plan conflict with or are inconsistent with the provisions of the plan document, the provisions of the plan document are controlling. Textron, Inc. reserves the right to amend, modify, suspend, replace, or terminate any of its plans, policies or programs, in whole or in part, including any level or form of coverage, by appropriate Company action, without your consent or concurrence.

(*Id.*)

m. During the first morning of open enrollment prior to commencing the employee enrollment process, E-Z-GO's HR representatives identified errors in the system.

n. Specifically, one error identified was that *hourly* employees were incorrectly shown as being covered by the LTD plan.

o. Essentially, salaried benefits were downloaded for all employees instead of splitting them into the two benefit plans for salaried and hourly status.

p. E-Z-GO's hourly employees, like Plaintiff, were not eligible for salary continuation benefits or LTD, because these benefits were part of the salaried benefit plan offered only to salaried employees.

q. Ms. Wilson contacted Fidelity to determine the source of the error but was unable to correct it during open enrollment.

r. Mr. Stewart testified that he was the final Textron person to sign off on the coding rules before they were sent to Fidelity and, to the best of his knowledge, he thought they were accurate. He humbly admitted that, as project lead, he would have been responsible for the LTD error, but that the error was in no way intentional.

s. Mr. Stewart's understanding of the LTD error is that "in the transmission of data to Fidelity, there was an error with regard to the mapping of certain employee type codes which resulted in the Fidelity

system essentially . . . reading . . . those codes as if all the employees were eligible for salaried benefits."

t. Mr. Stewart credibly testified that he was not aware of any way the LTD error could have been purposely or intentionally caused by Textron or E-Z-GO.

u. Meghan O'Connell works for Fidelity in the HR Services Division and became involved in Textron's account at Fidelity in 2005. Ms. O'Connell's deposition testimony confirmed Mr. Stewart's explanation of Fidelity's role as record-keeper for Textron, the outsourcing process, and the LTD error.

**2. Open Enrollment for Plan Year 2004**

a. Given the fact that the benefit year was due to start on January 1, 2004 and the large number of employees at E-Z-GO who needed to go through open enrollment, E-Z-GO moved forward with the enrollment process.

b. Ms. Wilson testified that it was important to proceed with the open enrollment process, despite the error, so that the employees could receive their benefit cards by the start of the new benefit year.

c. Plaintiff and his department went through the open enrollment process on November 13, 2003.

d. As part of the open enrollment process, Plaintiff and other employees proceeded to a

conference room filled with computers and members of E-Z-GO's HR department. (Stip. 9.)

e. Plaintiff used the computer to enroll in various benefits offered by Textron. He then received a Confirmation Statement listing his elections for Plan Year 2004. (Pl.'s Ex. 2.)

f. The Confirmation Statement provided that Plaintiff received, among other things, employer-paid salary continuation and LTD, but not STD. (*Id.*) The Confirmation Statement listed October 17, 2003 as Plaintiff's effective date for LTD. (*Id.*)

g. The Confirmation Statement further provided:

> A summary of the benefits provided under the plan is contained in the Summary Plan Description. Full details are provided in the official plan documents which governs the operation of the plan. In the event that the content of this application or any oral representations made by any person regarding the plan conflict with, or are inconsistent with, the provisions of the plan document, the provisions of the plan document prevail.
>
> The information presented in this application is not intended to create, nor is it to be construed to create, a contract between Textron and any one of Textron's employees or former employees. Textron reserves the right to amend, modify, suspend, replace or terminate any of its plans, policies or programs, in whole or in part, including any level or form

> of coverage by appropriate company action, without your consent or concurrence.

(*Id.*)

h. Ms. Wilson testified that she had already notified Fidelity of the error by the time the Confirmation Statement was sent, but Fidelity had not yet been able to correct the error.

i. Ms. Wilson testified that she orally explained the LTD error to the hourly employees at each open enrollment meeting. Ms. Wilson admitted that she only made this correction orally and did not do so in writing, although "in hindsight" she admitted that she should have done so in writing.

j. Conversely, Plaintiff testified that Ms. Wilson did not mention an error at the open enrollment meeting. Plaintiff testified that no one ever mentioned it "because we already knew we had [LTD]."

k. Plaintiff presented three former hourly employees of E-Z-GO to support his contention that there was no mention or correction of an LTD error at the meeting. However, the testimony of these witnesses was markedly inconsistent with each other and with Plaintiff's testimony, and unsupported by the credible evidence at trial.

l. Plaintiff's witness, Carl Rollins, worked at E-Z-GO as an hourly employee from 1991 to 2004. Mr. Rollins testified that neither LTD nor any type of mistake was mentioned by Ms. Wilson at the 2003 meeting. Mr. Rollins further testified that although

he did not have any documentation showing he was ever eligible for LTD, he nonetheless did receive something in writing from Textron from 1991 to 2003 informing him that he had LTD coverage. Mr. Rollins specifically testified that in 2002 he received a document in writing stating that he had LTD and STD coverage.

m. The documentary evidence simply does not support Mr. Rollins' testimony. To the contrary, it refutes it. Mr. Rollins' 2002 Enrollment Worksheet does not reference either LTD or STD. (*See* Def.'s Ex. 89.) [Sentence removed]

n. Plaintiff's witness, Kenneth Thomas, worked at E-Z-GO as an hourly employee from 1980 until September 2004. Mr. Thomas testified he was present at the November 2003 open enrollment meeting and there was no mention of an error regarding LTD. However, Mr. Thomas proceeded to testify that he never received a document indicating that he was entitled to LTD, but that he "may have received" something in the employee handbook indicating he was entitled to LTD.

o. Finally, Plaintiff's witness, Calvin Payne, worked at E-Z-GO as an hourly employee from 1981 until sometime in 2003. Mr. Payne testified that he received a document at the Fall 2002 meeting, rather than 2003, indicating he had LTD benefits. Mr. Payne was confused as to whether or not he was present at the November 2003 open enrollment meeting and thought that the meetings were held at the beginning

of each year. Mr. Payne testified that he inquired with E-Z-GO about LTD after having received the 2002 document but "cannot remember" what he was told.

p. The record evidence refutes Mr. Payne's recollection in critical respects. The enrollment worksheet signed by Mr. Payne in 2002 does not reference LTD, although he testified that he was "quite sure" he elected LTD in 2002. (*See* Def.'s Ex. 87.) Mr. Payne further testified that when his employment ended due to medical problems, he met with Ms. Wilson who helped him apply for Social Security Disability.

q. There is a lack of credible evidence to establish that the LTD error was not mentioned at the November 2003 open enrollment meeting. The testimony from the former E-Z-GO employees on this issue was wholly inconsistent and does not support a finding that Ms. Wilson failed to mention the LTD error at the meeting.

r. Plaintiff's counsel has pointed out that Ms. Wilson's testimony should be viewed skeptically because, although she no longer works at Textron, she still works in the HR field.

s. After listening carefully to each witness, observing each witness's demeanor, and considering each witness's testimony in light of all of the documentary evidence, the Court finds that Ms. Wilson's testimony was most credible.

t. Also, Plaintiff's counsel has repeatedly argued and has attempted to attach significance to the fact that Textron failed to bring any employees to bolster Ms. Wilson's contention that she orally corrected the erroneous PFS. Among the problems with Plaintiff's argument in that regard are the following: (1) Ms. Wilson did testify, and quite credibly, about her oral correction at the meeting; and (2) the three employees Plaintiff brought to counter her testimony did more harm than good to Plaintiff's case, in that their testimony conflicted in significant areas – raising inconsistencies among themselves and with Plaintiff.

u. Mr. Stewart testified that he was involved with the corrective process with Fidelity and the E-Z-GO HR department. However, he relied on E-Z-GO's HR department to communicate the issues to their employees.

v. Ms. Wilson testified that in her approximately fifteen years in the HR department at E-Z-GO, Plaintiff is the only hourly employee to ever inquire about LTD coverage. No other hourly employees inquired about LTD coverage or LTD claim forms, either before or after the November 2003 open enrollment.

### 3. Email Correspondence Among Ms. Wilson, Textron, MetLife, and Fidelity Representatives Regarding the LTD Error

a. On November 12, 2003, Ms. Wilson sent an email to a number of individuals including Doug

Stewart at Textron Corporate, MetLife, and Fidelity stating that the correct breakdown of benefits for hourly employees is "STD benefits only . . . Do not qualify for LTD benefits." (Def.'s Ex. 80.)

b. A chain of email correspondence ensued from Ms. Wilson's November 12, 2003 email between, *inter alia,* Ms. Wilson, Doug Stewart of Textron, a MetLife representative, and a Fidelity representative. (*See* Def.'s Ex. 80.)

c. On November 14, 2003, in response to Ms. Wilson's email, Doug Stewart asked that Fidelity "please provide an impact analysis of making the change. Please also include whether it is feasible to have a correction in place in time to reflect on the confirmation statements." (*Id.*)

d. On November 19, 2003, the Fidelity representative replied that she had documented the system changes needed to address the issue and planned to have the changes configured for release by December 6, 2003. (*Id.*)

e. Also on November 19, 2003, Doug Stewart emailed Ms. Wilson that the new confirmation statements "reflecting the accurate information" would be sent to employees after December 6th and the $20,750 cost of reprogramming the system would be charged to E-Z-GO. (*Id.*)

f. The Court was left with the distinct impression that no one at Textron, in Augusta or anywhere

else, intentionally mislead Plaintiff into thinking that he had LTD benefits when he did not.

### E. The Conclusion of Plaintiff's Employment

#### 1. Plaintiff Becomes Permanently Disabled

a. On or about December 18, 2003, Plaintiff commenced a STD leave of absence and did not work at Textron again after that time. (Stip. 25.)

b. On or about December 19, 2003, Plaintiff submitted a doctor's note excusing him from work to see an orthopedic specialist. (Stip. 20.)

c. Plaintiff applied for and received STD benefits between December 26, 2003 and June 24, 2004. (Stip. 10.)

d. On or about January 15, 2004, as part of Plaintiff's claim for STD benefits, a doctor found that Plaintiff was permanently disabled and would not be able to return to work due to Charcot joint in his right foot and ankle. (Stip. 37.)

e. A doctor's note dated January 21, 2004, which Plaintiff submitted to Textron, indicated that due to treatment of his Charcot ankle fracture, Plaintiff was unable to work at that time. (Stip. 38.)

f. A later doctor's note dated February 20, 2004, which Plaintiff submitted to Textron, advised that

Plaintiff was permanently 100% disabled and employment was a definite risk for complication. (Stip. 39.)

g. The February 20, 2004 doctor visit was further documented in another doctor's note dated June 22, 2004 which Plaintiff submitted to Textron. The June 22, 2004 note stated that Plaintiff had been seen in the doctor's office on February 20, 2004 for his foot and ankle and was unable to return to work permanently. (Stip. 40.)

h. Ms. Wilson credibly testified that she knew Plaintiff well because of the amount of time she spent with him working on his STD issues throughout her employment at E-Z-GO.

**2. Plaintiff's Interactions with Ms. Wiborg**

a. On April 20, 2004, when Ms. Wilson transferred to another department at E-Z-GO, Lisa Wiborg became the HR Manager at E-Z-GO. (Stip. 11.)

b. Plaintiff's STD leave exhausted in June 2004. Around that time Plaintiff began to have some interactions with Ms. Wiborg regarding his vacation pay and coverage. Plaintiff and Ms. Wiborg have vastly different recollections of their 2004 encounters.

c. Ms. Wiborg testified that at the June 2004 meeting, Plaintiff initially asked her for his unused vacation pay. Ms. Wiborg informed Plaintiff that vacation pay could not be given to someone who was

actively on a leave of absence. Ms. Wiborg testified that Plaintiff then asked her about his "disability retirement." Ms. Wiborg did not understand what Plaintiff meant and thought that perhaps he meant LTD benefits. She asked Plaintiff if he was referring to LTD insurance benefits and explained that he did not have LTD benefits. Ms. Wiborg testified that Plaintiff replied he knew he did not have LTD benefits, but was asking about his retirement pension instead. Ms. Wiborg was emphatic and most credible in her testimony when she testified that it was she, and not Plaintiff, who brought up LTD and that when she did, Plaintiff said he knew he did not have LTD.

d. Plaintiff, however, claims that he went to see Ms. Wiborg to "get the forms for [his] LTD." Plaintiff testified that Ms. Wiborg told him she was new and did not know anything about the process, so she would have to ask Ms. Wilson. Further, Plaintiff contends that Ms. Wiborg told him she also did not know anything about his vacation pay.

e. Ms. Wiborg credibly testified that Plaintiff did not ask for an LTD claim form or present the November 2003 PFS or Confirmation Statement to her at the June 2004 meeting. In fact, other than the misinterpretation of Plaintiff's question about his pension, LTD was not mentioned at the meeting.[3]

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[3] Stipulation 12 reads: "Plaintiff met in person with Ms. Wiborg in late June 2004 to discuss LTD insurance." The Court inquired of counsel what was meant by this stipulation in light of the strong testimony from Ms. Wiborg. Defense counsel

(Continued on following page)

Plaintiff did tell Ms. Wiborg that Neil Doolittle had promised him some type of pension.

f. Mr. Doolittle was the Employee Relations Manager at E-Z-GO until sometime in April 2004. Mr. Doolittle did not testify at trial.

g. Several weeks after the June 2004 meeting, Plaintiff returned to Ms. Wiborg's office to retrieve his employment file. Ms. Wiborg testified that she had made a mistake by not having his file photocopied as she had promised, so she personally photocopied the file while Plaintiff waited in the lobby. Again at this meeting, according to Ms. Wiborg, Plaintiff did not inquire about LTD insurance coverage, ask for an LTD claim form, or present the November 2003 PFS or Confirmation Statement to Ms. Wiborg.

h. Plaintiff, however, testified that at that meeting Ms. Wiborg told him that he did not have LTD because he was an hourly employee. Plaintiff claims he told Ms. Wiborg he did have LTD because he remembered signing up for it and he had always had LTD.

i. In July 2004, Plaintiff received a corrected Confirmation Sheet from Fidelity. The Confirmation Sheet showed his 2004 Plan Year benefits which

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explained that he meant that LTD was discussed, but not to imply that there was any specific purpose or agenda for the meeting and certainly not that Plaintiff raised the topic of LTD.

included STD, but not employer-paid salary continuation or LTD. (Pl.'s Ex. 7.)

j. Around July or August 2004, Plaintiff applied for Social Security Disability Benefits, informing the Social Security Administration that he was unable to work due to problems with his right foot and ankle. (Stip. 26.)

k. On September 1, 2004, Plaintiff's doctor sent a note to E-Z-GO indicating Plaintiff was "permanently disabled." (Stip. 27.)

l. On September 4, 2004, during a discussion with Ms. Wiborg, Plaintiffs employment with E-Z-GO concluded as a result of his permanent disability which precluded him from working. (Stip. 28.) Plaintiff inquired about his vacation pay. Again, according to Ms. Wiborg, Plaintiff did not inquire about LTD insurance coverage, ask for an LTD claim form, or present the erroneous November 2003 PFS or Confirmation Statement to Ms. Wiborg.

m. Plaintiff testified that throughout each meeting he questioned Ms. Wiborg about LTD multiple times.

n. At trial, Ms. Wiborg impressed the Court as an honest, forthright, and careful person who gave extremely credible testimony. The Court carefully observed Plaintiff and Ms. Wiborg, and hereby finds that Ms. Wiborg's testimony is the more credible version of the events that transpired at the meetings between Plaintiff and Ms. Wiborg in 2004.

o. Ms. Wiborg testified that Plaintiff contacted her in November 2004, and for the first time raised the issue of LTD coverage. Ms. Wiborg testified that Plaintiff told her he had a PFS indicating he was eligible for LTD. Ms. Wiborg explained the PFS had been created in error by Fidelity and that Plaintiff was not entitled to LTD.

p. On or about March 7, 2005, the Social Security Administration notified Plaintiff that they determined he was disabled for Social Security purposes. (Stip. 22.)

q. Plaintiff's right foot and ankle problems prevent him from performing every day tasks. (Stip. 21.)

r. Since December 2003, Plaintiff has been disabled and unable to work regardless of whether he was eligible for LTD benefits through Textron. (Stip. 42.)

**F. Plaintiff's Calls to Fidelity**

1. After his employment concluded and after receiving his employment file from Ms. Wiborg, Plaintiff contacted Fidelity and had conversations with Fidelity representatives on October 13, 14, and 18, 2004.

2. Plaintiff's calls to Fidelity were recorded, and the transcripts of those calls were admitted into evidence at trial. (*See* Def.'s Ex. 76.)

3. In each of these conversations, Plaintiff told the Fidelity representative he had a November 2003 PFS that shows him enrolled in LTD, and asked whether Fidelity can confirm that he had LTD coverage in 2003 and 2004. (*See id.*)

4. During the October 13, 2004 discussion, the Fidelity representative informed Plaintiff that their records did not indicate that he had LTD, but that he should contact MetLife and gave Plaintiff the telephone number for MetLife. (*See id.*)

5. During the October 14, 2004 conversation, the Fidelity representative informed Plaintiff that Fidelity was not Textron's record-keeper in 2003, but he was able to pull up the November 2003 document indicating LTD coverage. However, the Fidelity representative then told Plaintiff the records indicated that as of January 1, 2004 Plaintiff was only enrolled in STD. (*See id.*)

6. During the October 18, 2004 conversation, the Fidelity representative informed Plaintiff that he needed to contact Textron's HR department because Fidelity's records could neither confirm nor deny whether he was enrolled in LTD for 2003. (*See id.*)

7. A second conversation on October 18, 2004 again confirmed that Plaintiff did not have LTD as of January 1, 2004, but that Plaintiff needed to contact Textron about coverage in 2003. (*See id.*)

**G. Plaintiff's Contentions**

1. Despite the overwhelming evidence to the contrary, Plaintiff testified that he believed he had LTD coverage at E-Z-GO from the inception of his employment.

2. Plaintiff testified that the person who conducted his initial job interview at E-Z-GO told him LTD benefits would be included in his benefit package. Plaintiff contends that he relied on this interview statement in accepting the job at Textron.

3. Prior to Plaintiff being hired by E-Z-GO, he had also done some temporary work at Kendall's Warehouse and had been laid off from that job. Plaintiff testified that about two weeks after E-Z-GO hired him, Kendall's offered him a permanent job. Plaintiff declined the job at Kendall's, but claims that Kendall's benefit package would have included LTD coverage.

4. Plaintiff testified that he would often discuss his STD leave with Mr. Doolittle, rather than Ms. Wilson. When asked on cross-examination if Mr. Doolittle ever promised him LTD coverage, Plaintiff replied "no, the company did."

5. Plaintiff testified that he thought he had LTD coverage not only because of the alleged interview statement and the November 2003 documents, but that he had also received a confirmation printout in 2002 that indicated LTD coverage. Plaintiff said that he no longer had the 2002 printout because he

had thrown it away. No such printout was located anywhere.

6. Contrary to Plaintiff's testimony, his Confirmation Statement dated November 2002 lists his benefits that would become effective in January 2003, and does not list LTD coverage. (*See* Def.'s Ex. 79.)

7. Plaintiff admitted that, other than the erroneous November 2003 PFS and Confirmation Statement, he does not have anything in writing that would suggest he was eligible for LTD coverage at any time.

8. Plaintiff testified that although he thought he had LTD coverage, he never actually applied for it or filled out an LTD claim form. In fact, he never contacted MetLife regarding LTD coverage.

9. Prior to June 2005, Plaintiff had never seen Textron's LTD insurance plan document. (Stip. 13.)

10. To the extent any of these Findings of Fact constitute Conclusions of Law, they are hereby adopted as both.

## II. CONCLUSIONS OF LAW

Plaintiff contends that Textron breached its fiduciary duty by allegedly misrepresenting, over an extended period of time, that he was covered by the LTD plan. (*See* Doc. no. 101.) Plaintiff contends that he relied on these representations to his detriment. Specifically, Plaintiff bases his claim on the alleged

1988 interview statement, the erroneous November 2003 PFS and Confirmation Statement, and his telephone conversations with Fidelity in October 2004. Textron admits that the November 2003 documents from Fidelity contained an error indicating that Plaintiff and all hourly employees were eligible for LTD when, in actuality, they were not.

Textron, however, contends that Plaintiff's claim for breach of fiduciary duty fails because: (1) Textron was not acting as a fiduciary with respect to the plan; (2) Textron did not make misrepresentations to intentionally deceive Plaintiff; and (3) Plaintiff did not detrimentally rely upon said misrepresentations. In addition, Textron emphasizes that even assuming the aforementioned elements were met, Plaintiff nonetheless did not meet the criteria for receiving LTD benefits under the plain language of the plan. More precisely, even if the Court found that Plaintiff was somehow covered by the LTD plan, Textron argues that he would not have been eligible to receive LTD benefits due to his pre-existing condition, as defined by the LTD plan itself.

### A. Breach of Fiduciary Duty Claim

To establish a claim for breach of fiduciary duty based on alleged misrepresentations concerning coverage under an ERISA plan, Plaintiff must show: (1) Defendant was acting in a fiduciary capacity when it made the alleged misrepresentations; (2) Defendant made a material misrepresentation; and (3) Plaintiff

relied on that misrepresentation to his detriment. *See Varity Corp. v. Howe,* 516 U.S. 489, 498, 116 S. Ct. 1065, 1071 (1996); *Henkin v. AT&T Corp.,* 80 F. Supp. 2d 1357, 1362 (N.D. Ga. 1999) (citing *Cerasoli v. Xomed, Inc.,* 47 F. Supp. 2d 401, 405 (W.D.N.Y. 1999)).

**1. Fiduciary with Respect to the Plan**

a. To establish liability for a breach of fiduciary duty under ERISA, Plaintiff must first show that Defendant is in fact a fiduciary with respect to the plan. *Cotton v. Massachusetts Mut. Life Ins. Co.,* 402 F.3d 1267, 1277 (11th Cir. 2005) (citing *Baker v. Big Star Div. of the Grand Union Co.,* 893 F.2d 288, 289 (11th Cir. 1989). ERISA provides that a person is a plan fiduciary to the extent "he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or "he has any discretionary authority or discretionary responsibility in the administration of such plan." *See* 29 U.S.C. § 1002(21)(A).

b. An employer is a fiduciary only "to the extent" it performs a fiduciary function related to the plan, and does not act as a fiduciary when performing employer functions. *See Varity,* 516 U.S. at 498, 116 S. Ct. at 1071; *Cotton,* 402 F.3d at 1277. Nondiscretionary, ministerial acts related to the plan are not fiduciary actions. *See Adams v. Brink's Co.,* 2008 WL 142771, *6 (4th Cir. 2008) (citation omitted) (finding

employer-plan administrator was a not a fiduciary with respect to the plan because while it performed administrative duties for the plan, it lacked discretionary authority to determine eligibility for benefits or amount of benefits under the plan); *Cerasoli,* 47 F. Supp. 2d at 407.

c. Plaintiff has presented insufficient evidence to suggest that Textron was acting as a fiduciary with respect to the LTD plan when the erroneous November 2003 documents from Fidelity were distributed to the hourly employees. The uncontradicted evidence established that Textron's HR personnel do not perform fiduciary functions and possess no discretionary authority regarding the LTD plan. The SPD provides that MetLife has authority to interpret the terms and conditions of the plan and is responsible for the claims administration and determining whether to admit or deny an LTD claim. (*See* Def.'s Ex. 5, Bates Stamp 000003, 000036.)

d. Even if the credible evidence had established that Plaintiff was told he would have LTD coverage during his 1988 interview, which the Court finds it does not, the HR interviewer was not a fiduciary with respect to the LTD plan. *See Cerasoli,* 47 F. Supp. 2d at 408-409 (even if employer had some discretionary authority, he was not a fiduciary when alleged misrepresentations about coverage were made in his capacity as employer, to inform plaintiff about matters relating to his status as a new employee); *Holsey v. Unum Life Ins. Co. of Am.,* 954 F. Supp. 144, 148 (E.D. Mich. 1997) (employer's President and Vice

President were not acting in fiduciary capacity when communicating with employee about his fringe benefits; such communications were merely discussions that occurred in the normal course of business and were "quintessential 'employer' function[s]").

e. Simply put, Textron's limited role in relation to the LTD plan does not rise to the level of acting in a fiduciary capacity. Thus, Textron was not acting in a fiduciary capacity when the alleged interview statement was made or when the erroneous documents were sent from Fidelity.

**2. Intentional Material Misrepresentations**

a. Assuming *arguendo* that Textron was a fiduciary with respect to the plan, in cases such as this, where the plan document and SPD are unambiguous, oral representations, promises, or informal written communications cannot alter an ERISA plan, absent a showing of intentional fraudulent promises. *See Alday v. Container Corp. of Am.*, 906 F.2d 660, 666 (11th Cir. 1990) (noting that a fiduciary who makes fraudulent promises in informal communications that deceive employees will not be insulated from liability); *Clark v. Hartford Life & Acc. Ins. Co.*, 195 Fed. Appx. 932, *2 (11th Cir. 2006) (quoting *Meadows v. Cagle's, Inc.*, 954 F.2d 686, 691 (11th Cir. 1992)).

b. A misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making a decision regarding his

benefits. *See Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3rd Cir. 2001).

c. The credible evidence does not support a finding that Textron made material misrepresentations or intentionally misrepresented that Plaintiff had LTD coverage. Plaintiff readily admits and the evidence shows he was permanently unable to work beyond December 18, 2003, regardless of whether he was eligible for LTD. Further, the credible evidence shows that no other hourly employee inquired about or made a claim for LTD benefits, before or after the November 2003 open enrollment.

d. Textron admits that the November 2003 documents from Fidelity contained an inadvertent error showing LTD coverage for hourly employees. Ms. Wilson credibly testified that she verbally acknowledged and attempted to correct the error at the open enrollment meetings. Textron also admits that the error was not formally corrected in writing until Plaintiff received the corrected Confirmation Statement in July 2004. It is surprising that a company of the size and sophistication of Textron would not have taken more proactive measures to quickly follow up the verbal correction in writing. However, while it may have been a poor decision on behalf of Textron to fail to follow the verbal correction with a written one, the credible evidence does not suggest, much less prove, that this was an intentional act to deceive its employees.

e. Ms. Wilson testified that she told all employees who were in attendance at the open enrollment meetings about the LTD error. Plaintiff's counsel correctly pointed out that Ms. Wilson does not have an attendance record from the meeting and does not account for the fact that the employees had the option of enrolling online from any location. That is, E-Z-GO employees did not have to be present at the open enrollment meetings in order to enroll for benefits for the upcoming year, thus some employees may not have heard Ms. Wilson's correction. While the Court recognized and considered this deficiency in Ms. Wilson's chosen method of rectifying the error, the Court does not find the testimony of the hourly employees convincing or credible and certainly not indicative that Ms. Wilson was lying.

f. Furthermore, even if the Court were to discount Ms. Wilson's testimony and find that she did not verbally correct the error at the meeting, the other credible evidence at trial warrants a conclusion that Textron did not intend to deceive its employees. The credible testimony of Mr. Stewart and Ms. Wilson, along with the chain of emails among Textron, Fidelity, and MetLife representatives, show that the LTD error was discovered, efforts were being made to correct it, and Fidelity communicated to Textron that the error would be corrected. Ms. Wilson and Mr. Stewart credibly testified about the error, the corrective process, and the related cost.

### 3. Reliance

a. Even if the Court were to find that Textron was a fiduciary and that Textron made a material misrepresentation (which findings the Court specifically does not make), Plaintiff's claim would not prevail for a third independent reason: reliance. Plaintiff has not convinced the Court that he reasonably relied on Textron's admitted error or alleged misrepresentations to his detriment. Plaintiff's only evidence of his promise of LTD coverage at his job interview consists of his own testimony. Plaintiff's unsupported testimony is not credible. Nonetheless, even if the Court were to find that testimony credible, several intervening events and documents would make Plaintiff's continued reliance unreasonable.

b. First, Plaintiff received two employee handbooks subsequent to the alleged interview statement. Neither handbook indicated that hourly employees were eligible for LTD coverage. One of the handbooks did specifically list LTD under the section for salaried employees. Plaintiff also signed a handbook acknowledgment informing him that the handbook would supersede any oral promises.

c. In regard to the erroneous November 2003 PFS and Confirmation Statement, as discussed *supra*, Ms. Wilson credibly testified that she verbally corrected the error at the open enrollment meeting. Any reliance by Plaintiff on these documents after her verbal correction would be unreasonable. Of particular importance, both documents contained

disclaimers indicating that the plan documents would control if the plans were inconsistent with the two Fidelity generated documents.

d. In addition, a careful review of Plaintiff's telephone conversations with Fidelity in October 2004 undermines his contention of reliance on anything prior to the erroneous November 2003 documents. The Fidelity representatives were unable to tell Plaintiff whether he had LTD coverage in 2003 because they were not responsible for Textron's record-keeping at that time. One Fidelity representative was able to retrieve the erroneous November 2003 PFS, which showed LTD coverage. Yet, each Fidelity representative told Plaintiff the records showed that he definitely did not have LTD as of January 1, 2004 and that he should contact MetLife and Textron. Plaintiff repeatedly referred to the November 2003 PFS and asked how Fidelity could tell him he did not have LTD when he had a document saying that he did have LTD.

e. Curiously absent from these conversations is any reference by Plaintiff to any other reason why he believed he had LTD coverage. Plaintiff did not reference the alleged interview statement or convey that he believed he had coverage for any reason other than the November 2003 PFS. This supports a conclusion that Plaintiff did not believe he had LTD coverage prior to receiving the November 2003 documents. Further, Ms. Wiborg credibly testified that during her multiple interactions with Plaintiff beginning in June 2004, Plaintiff never inquired about

LTD coverage or referenced the November 2003 documents. It was not until November of 2004 – after he received his employment file – that Plaintiff called Ms. Wiborg and inquired about LTD coverage. If Plaintiff believed that he had LTD coverage from the inception of his employment in 1988 or from his receipt of the November 2003 PFS, Plaintiff would have asked Ms. Wiborg about LTD at some point in time between June 2004 and November 2004.

f. The transcripts of the Fidelity calls and Ms. Wiborg's testimony undermine Plaintiff's credibility. Therefore, there is sufficient credible evidence from which to conclude that Plaintiff did not reasonably rely to his detriment on the alleged interview statement, the erroneous November 2003 documents, or the telephone conversations with Fidelity. Simply put, based on the evidence, the strong, almost unavoidable inference the Court is left with is that Plaintiff knew he did not have LTD coverage.

g. The LTD error in November 2003 and Textron's actions thereafter, do not afford Plaintiff a viable cause of action or grounds for relief. In sum, the credible evidence does not establish and Plaintiff has failed to prove a breach of fiduciary duty claim against Textron.

### B. The LTD Plan's Limitation for Pre-Existing Conditions

1. Even if the Court were to find that Plaintiff, due to the erroneous November 2003 documents, was

covered by the LTD plan, he nonetheless would not qualify for benefits because the LTD plan does not provide benefits for Pre-Existing Conditions.

2. Under the terms of the LTD plan and SPD, only salaried employees working at least 32 hours per week are eligible to receive LTD benefits. (Def.'s Ex. 5, Bates Stamp 000013.)

3. In order to be eligible for benefits, a salaried employee must be an Active Employee. An Active Employee does not include an individual who is on a leave of absence due to Disability. (*See* Def.'s Ex. 5, Bates Stamp 000015).

4. The SPD provides that no benefits are payable under the LTD plan in connection with a Pre-Existing Condition, as follows:

> You may be Disabled due to a Pre-Existing Condition. No benefits are payable under This Plan in connection with that Disability unless your Elimination Period starts after you have been an Active Employee under This Plan for 12 consecutive months.
>
> A Pre-existing Condition is an injury, sickness, or pregnancy for which you in the 6 months before your Effective Date:
>
> 1. received medical treatment, consultation, care, or services;
>
> 2. took prescription medications or had medications prescribed; or

> 3. had symptoms or conditions which would cause a reasonably prudent person to seek diagnosis, care, or treatment.

(Def.'s Ex. 5, Bates Stamp 000024.)

5. The Elimination Period is defined as 180 days of Disability. (Def.'s Ex. 5, Bates Stamp 000013.)

6. The SPD defines Effective Date of coverage as the later of either: (1) your Eligibility Date (i.e. "January 1, 2002 or the date you became an Eligible Employee, whichever is later."), or (2) the date you meet the Active Employee requirements. (See Def.'s Ex. 5, Bates Stamp 000013, 000015.)

7. The erroneous November 2003 Confirmation Statement lists Plaintiff's Effective Date of coverage as October 17, 2003.

8. Even if Plaintiff was covered by the LTD plan as of October 17, 2003, he still was not qualified for LTD benefits because he became disabled due to a Pre-Existing Condition that existed in the six months prior to the alleged Effective Date of October 17, 2003, and his Elimination Period did not begin after twelve months of employment under the LTD plan.[4]

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[4] Plaintiff's counsel ostensibly argues that the Pre-Existing Condition limitation does not apply to Plaintiff because he has had LTD from the inception of his employment or at least since January 1, 2002. For the reasons discussed *supra*, the Court does not find this argument credible or convincing.

9. Therefore, Plaintiff would not have been eligible for LTD benefits under the plan regardless of whether Textron breached its fiduciary duty to Plaintiff.

10. To the extent any of these Conclusions of Law constitute Findings of Fact, they are hereby adopted as both.

## III. CONCLUSION

Upon the foregoing, the Court finds that Defendant is entitled to judgment in its favor. Accordingly, the Clerk is directed to **ENTER FINAL JUDGMENT** in favor of Defendant and **CLOSE** this case.

**SO ORDERED** at Augusta, Georgia this 31st day of March, 2008.

/s/ LGW
HONORABLE
LISA GODBEY WOOD
UNITED STATES
DISTRICT JUDGE

**United States District Court**
***Southern District of Georgia***

TERRANCE ROLLAND,

Plaintiff,

V.

TEXTRON, INC.,
a foreign corporation,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CV 105-023

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED**

that, in accordance with the Court's Order entered on March 31, 2008, Final Judgment is hereby in favor of the Defendant, TEXTRON, INC., and against the Plaintiff, TERRANCE ROLLAND.

March 31, 2008
*Date*

Scott L. Poff
*Clerk*

/s/ Joseph A. Howell
*(By) Deputy Clerk*

[SEAL]

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION**

| | | |
|---|---|---|
| TERRANCE ROLLAND, Plaintiff, | : | CIVIL ACTION |
| v. | : | |
| TEXTRON, INC., a foreign corporation, | : | NO. CV105-23 |
| Defendant. | : | |

**ORDER**

(Filed Aug. 13, 2007

Plaintiff, Terrance Rolland, filed the above action against his former employer, Textron, Inc., to recover benefits allegedly due and payable under an employee welfare benefit plan. Presently before the Court are the parties' motions to strike certain affidavits and Defendant's motion for summary judgment. For the reasons stated below, the parties' motions to strike certain affidavits will be **DENIED**. Defendant's motion for summary judgment will be **GRANTED IN PART and DENIED IN PART**. The Defendant's motion to strike Plaintiff's jury demand will be **GRANTED**.

**FACTS**

Plaintiff was employed by Textron as an hourly employee at its E-Z-GO plant in Augusta, Georgia,

from October 1987 until December 18, 2003, the date he was unable to return to work due to complications related to his diabetes. As a Textron employee, Plaintiff participated in Textron's employee welfare benefit plan.

Each year, Plaintiff signed up for employee benefits during an open enrollment period between October and November. Prior to the open enrollment process, Plaintiff received a personal fact sheet ("PFS") showing his Plan Year benefit elections and contribution amounts. After open enrollment was complete, Plaintiff would receive a benefit confirmation sheet ("BCS").

In 2003, Textron contracted with Fidelity as an outside vendor to centralize all of Textron's North American benefit and payroll systems. Part of this centralization included implementation of an online enrollment procedure.

The Plan Year 2004 PFS and BCS showed that Plaintiff was enrolled in the employer paid salary continuation and long term disability benefit plans. Neither document made any reference to short term disability benefits.

In December 2003, Plaintiff became unable to return to work due to his disability. After short term disability benefits were exhausted on June 24, 2004, Plaintiff inquired about the availability of long term benefits. Plaintiff contends that he was advised by the plan administrator that he was enrolled in the long term disability plan. When he attempted to

make application for long term benefits, however, Defendant denied that Plaintiff was ever enrolled in the long term plan. Plaintiff alleges that Defendant refused to provide him with any requested information, including 2004 plan documents.

Plaintiff filed suit in this Court based on the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* and 28 U.S.C. § 1331. In his complaint, Plaintiff asserts that he is entitled to long term disability benefits under the plan or, in the alternative, that Defendant has fraudulently and knowingly misrepresented to Plaintiff that he was entitled to such benefits. Plaintiff further alleges that Defendant has willfully failed to respond to Plaintiff's requests for plan documents. In addition to seeking long term disability benefits allegedly due under Textron's employee welfare benefit plan, Plaintiff seeks punitive damages, attorneys' fees, and court costs for Defendant's alleged bad faith.

On October 17, 2005, Defendant filed the instant motion for summary judgment. Defendant advances several arguments in support of its motion. Defendant argues that preemption bars Plaintiff's claims and entitles it to summary judgment. Defendant further argues that Plaintiff lacks standing, Plaintiff does not meet the eligibility requirements for long term disability benefits, and Plaintiff cannot establish that Textron engaged in fraud. In the alternative, Defendant argues that the Court should strike Plaintiff's jury demand.

Additionally, both Plaintiff and Defendant have moved to strike certain affidavits submitted by the opposing party. Plaintiff has filed a motion to strike the supplemental affidavits of Greg Peters and Denise Wilson. Defendant has filed a motion to strike paragraph 10 and Exhibit 2 of Plaintiff's November 8, 2005 affidavit.

## DISCUSSION

### I. Motions to Strike

Rule 56(e) of the Federal Rules of Civil Procedure requires that "affidavits" that support or oppose summary judgment motions "be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." On a motion for summary judgment, the court may consider only that evidence which can be "reduced to an admissible form." *Rowell v. BellSouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005) (citing *Macuba v. Deboer,* 193 F.3d 1316, 1324-25 (11th Cir. 1999)); *Denney v. City of Albany,* 247 F.3d 1172, 1189 n.10 (11th Cir. 2001). That is, the evidence "must be admissible at trial for some purpose." *See Macuba,* 193 F.3d at 1323.

#### A. Plaintiff's Motion to Strike

In addition to asserting specific objections to the Peters and Wilson affidavits, Plaintiff objects to these affidavits because Defendant filed them without first seeking permission of the Court. Plaintiff has offered, and the Court has found, no legal authority, either in

the language of Rule 56(e) itself or relevant case law, requiring a party to seek permission of the court before filing an affidavit in support of a summary judgment motion.

Plaintiff objects to the relevancy of Peters' supplemental affidavit authenticating Fidelity Investments' September 5, 2005 letter. Because Defendant filed the Peters' affidavit in response to Plaintiff's challenge to the authenticity of the Fidelity letter, the Court concludes that Peters' affidavit is admissible in support of Defendant's motion for summary judgment.

Plaintiff similarly objects to the relevancy of Denise Wilson's supplemental affidavit as to any issue in this case. In addition, Plaintiff argues that Wilson's testimony is inadmissible because it is not based on personal knowledge as required by Rule 56(e). In her supplemental affidavit, Wilson offers testimony as to the manner in which Textron customarily distributed summary plan descriptions and other plan documents to its salaried and hourly employees based on knowledge obtained while performing her duties in Textron's Human Resources Department for more than ten years. Under Federal Rule of Evidence 406, "[e]vidence of the . . . routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is, relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the habit or routine practice." Thus, the Wilson

affidavit is admissible in support of Defendant's motion for summary judgment.

**B. Defendant's Motion to Strike**

Defendant objects to paragraph 10 of Plaintiff's November 8, 2005 affidavit on the ground that it impermissibly relies on hearsay, and Exhibit 2 referenced therein, on the ground that it has not been properly authenticated. In paragraph 10 of his affidavit, Plaintiff testifies as to the efforts he made to authenticate documents provided to him in response to his request under the Freedom of Information Act ("FOIA") relating to several telephone conversations he had with an investigator from the Department of Labor ("DOL"). The exhibit at issue consists of the documents provided by the DOL in response to Plaintiff's FOIA request.

Hearsay is "an out-of-court statement offered to prove the truth of the matter asserted." Fed. R. Evid. 801(c); *Cargill v. Turpin,* 120 F.3d 1366, 1373 (11th Cir.), *reh'g & reh'g en banc denied,* 131 F.3d 157 (1997), *cert. denied,* 523 U.S. 1080, 118 S.Ct. 1529, 140 L.Ed.2d 680 (1998) (citations omitted). An out of court statement is inadmissible unless the statement is not hearsay as provided by Rule 801(d), or falls into one of the hearsay exceptions enumerated in the Federal Rules of Evidence. *United States v. Baker,* 432 F.3d 1189, 1203 (11th Cir. 2005). Generally, inadmissible hearsay cannot be considered on a motion for summary judgment. *Club Car, Inc. v. Club*

*Car (Quebec) Import, Inc.*, 362 F.3d 775, 783 (11th Cir.), *reh'g & reh'g en banc denied,* 111 Fed. Appx. 1003, *cert. denied,* 543 U.S. 1002, 125 S.Ct. 618, 160 L.Ed.2d 461 (2004).

Central to the Court's determination as to whether Plaintiff's offered testimony is inadmissible hearsay is the purpose for which the testimony was offered. Plaintiff's affidavit was offered for numerous purposes, including to demonstrate that Defendant offered long term disability benefits to hourly employees, that hourly employee enrollment in the long term plan was not erroneous, and that facts existed suggesting that Plaintiff was enrolled in the long term disability plan. (*See* Rolland Aff. ¶¶ 9, 10, 17, 27, 39, 40-41, 44, 53-56, 83.)

Paragraph 10 and Exhibit 2 of Plaintiff's affidavit are admissible in support of Plaintiff's opposition to Defendant's summary judgment motion. Plaintiff's testimony regarding what Fidelity allegedly told the DOL investigator is inadmissible hearsay for the purpose of demonstrating that Plaintiff was, in fact, entitled to long term benefits. It would be admissible, however, to demonstrate that Plaintiff was *told* he was entitled to these benefits. *See* Fed. R. Evid. 801(c) Advisory Committee Note ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."). Further, the remainder of Plaintiff's testimony contained in paragraph 10 of his affidavit would be admissible to demonstrate the manner in which Plaintiff came

into possession of the documents attached to his affidavit as Exhibit 2 and his efforts to authenticate the same. Finally, the official record of the DOL investigation is admissible under Federal Rule of Evidence 803(8)[1].

## II. Defendant's Motion for Summary Judgment

Summary judgment is appropriate when no genuine issues remain and the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, all facts and reasonable inferences are to be construed in favor of the non-moving party. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004). The party opposed to the summary judgment motion, however, "may not rest upon the mere allegations or denials in its pleadings. Rather, its responses . . . must set forth specific facts showing that there is a

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[1] Federal Rule of Evidence 803(8) provides:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

genuine issue for trial." *Walker v. Darby,* 911 F.2d 1573, 1576-77 (11th Cir. 1990).

## A. Preemption

Defendant argues that the Plaintiff's claims sound in state law and, as a result, should be dismissed as preempted by ERISA. "ERISA has two central goals: (1) protection of the interests of employees and their beneficiaries in employee benefit plans . . . ; and (2) uniformity in the administration of employee benefit plans. . . ." *Heffner v. Blue Cross & Blue Shield of Ala., Inc.,* 443 F.3d 1330, 1333 (11th Cir.), *reh'g & reh'g en banc denied,* 186 Fed. Appx. 983 (2006) (quoting *Horton v. Reliance Standard Life Ins. Co.,* 141 F.3d 1038, 1041 (11th Cir. 1998)). Congress determined that these goals would be best served by establishing exclusive federal regulation, and ERISA therefore bars all state claims bearing on employee benefit plans unless they are protected by the savings clause of the statute.[2] *Aetna Health Inc. v. Davila,* 542 U.S. 200, 208, 124 S.Ct. 2488, 2495, 159 L.Ed.2d 312 (2004); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47-49, 107 S.Ct. 1549, 1553, 95 L.Ed.2d 39 (1987). ERISA preemption is "deliberately expansive," and designed to establish plan regulation as exclusively a federal concern. *Pilot Life,* 481 U.S. at 46, 107 S.Ct. at 1552; *see also N.Y. State Conference of Blue Cross &*

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[2] The savings clause, 29 U.S.C. 1144(b), is not invoked in the present action.

*Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 651-52, 115 S.Ct. 1671, 1675, 131 L.Ed.2d 695 (1995). "Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health, Inc.*, 542 U.S. at 209, 124 S. Ct. at 2495.

Plaintiff concedes that his state law claims are preempted under ERISA. *See Sanson v. Gen. Motors Corp.*, 966 F.2d 618, *reh'g denied*, 974 F.2d 1350 (11th Cir. 1992), *cert. denied*, 507 U.S. 984, 113 S.Ct. 1578, 123 L.Ed.2d 146 (1993) (claims related to employer's alleged fraudulent misrepresentation as to availability of benefits under a special retirement program preempted by ERISA); *see also Franklin v. OHG of Gadsden, Inc.*, 127 F.3d 1024, 1028-29 (11th Cir. 1997) (state law claims of fraud and misrepresentation based upon the failure of a covered plan to pay benefits preempted by ERISA); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757 (5th Cir. 1990) (ERISA preempts state law claims of fraud and misrepresentation without regard to whether ERISA provided any remedy for claimed wrong). In his response to Defendant's motion, Plaintiff attempts to circumvent ERISA preemption by asserting that his state tort law claims are alleged in the alternative as permitted by Federal Rule of Civil Procedure 8(a), in the event the Court determines he cannot recover under ERISA. Such alternative pleading, however, would clearly undermine congressional intent to

make the ERISA remedy exclusive. *Aetna Health Inc.*, 542 U.S. at 214, 124 S.Ct. at 2498, n.4 ("[A] state cause of action that provides an alternative remedy to those provided by the ERISA civil enforcement mechanism conflicts with Congress' clear intent to make the ERISA mechanism exclusive."). Nevertheless, Plaintiff's ERISA claims are, of course, not subject to ERISA preemption. In light of Plaintiff's clear citation to the ERISA statute in his complaint (Compl. ¶ 1), Plaintiff is not entitled to summary judgment on Plaintiff's ERISA claims based on ERISA preemption.

**B. Breach of Fiduciary Claim**

Defendant further argues that Plaintiff has failed to allege a breach of fiduciary duty claim under ERISA. Under the Federal Rules of Civil Procedure, a complaint need only contain a short and plain statement of the claim upon which Plaintiff is entitled to relief and a demand for relief. Fed. R. Civ. P. 8(a). "A complaint need not specify in detail the precise theory giving rise to recovery. All that is required is that the defendant be on notice as to the claim being asserted against him and the grounds on which it rests." *Hamilton v. Allen-Bradley Co., Inc.*, 244 F.3d 819, 823 (11th Cir. 2001) (quoting *Sams v. United Food & Commercial Workers Int'l Union, AFL-CIO, CLC,* 866 F.2d 1380, 1384 (11th Cir. 1989)). Material misrepresentations or misleading communications to plan participants regarding plan administration will support a claim for breach of fiduciary duty. *Jones v.*

*Am. Gen. Life and Acc. Ins. Co.*, 370 F.3d 1065, 1072 (11th Cir. 2004) (citing *Ervast v. Flexible Prods. Co.*, 346 F.3d 1007 (11th Cir. 2003)). In his complaint, Plaintiff alleges that Defendant "fraudulently and knowingly misrepresented" to Plaintiff that he was covered by the long term disability plan and "failed and refused" to "respond to [Plaintiff's] requests for information." Under the liberal pleading policy of the Federal Rules, Plaintiff's allegations are sufficient to put Defendant on notice as to Plaintiff's breach of fiduciary duty claim. *See* Fed. R. Civ. P. 8(a).

### C. Standing

Defendant further argues that Plaintiff lacks standing to assert a breach of fiduciary claim because he was not a "participant" in Textron's long term disability plan. ERISA confers standing upon "participants" and "beneficiaries" of an ERISA plan. 29 U.S.C.A. § 1132. A "participant" is defined by ERISA as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C.A. § 1002(7). In order for a former employee to establish that he is a "participant" with standing to bring an ERISA claim, a plaintiff must not be simply "someone who claims to be a participant or beneficiary," but must be "either [an] employee in, or

reasonably expected to be in, currently covered employment, or [a] former employee who [has] . . . a reasonable expectation of returning to covered employment or [has] a colorable claim to vested benefits." *See Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117-18, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989). The Court concludes that Plaintiff has arguably stated a colorable claim to vested benefits.

### D. Enforceability of Oral Promises and Informal Documents

Defendant argues, in the alternative, that Plaintiff's claims should be dismissed because oral promises and informal documents cannot alter the plain and unambiguous language of the plan documents. "When plan documents unambiguously address the substantive rights of the parties at issue, the plan language controls, absent a showing of intentional fraudulent promises by the insurer in informal communications with the insured." *Clark v. Hartford Life and Acc. Ins. Co.,* 195 Fed. Appx. 932, *2 (11th Cir. 2006) (quoting *Meadows v. Cagle's, Inc.,* 954 F.2d 686, 691 (11th Cir. 1992)); *see also Alday v. Container Corp. of Am.,* 906 F.2d 660, 666 & 666 n. 15 (11th Cir. 1990), *cert. denied,* 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991) (noting the "holding does not insulate from liability a fiduciary who makes fraudulent promises in informal communications that deceive employees and contradict the terms of the SPD. In such a case, there may be valid reasons for a court to look beyond the unambiguous language of

the SPD in interpreting the plan.") Plaintiff alleges that "Defendant has fraudulently and knowingly misrepresented to Plaintiff that he was covered by [the long term disability] plan." Thus, construing the evidence in the light most favorable to Plaintiff, genuine issues exist thereby precluding summary judgment as to Plaintiff's ERISA claims.

## III. JURY DEMAND

The Eleventh Circuit has repeatedly held that plaintiff's are not entitled to jury trials under ERISA because such claims are equitable in nature. *Broaddus v. Fla. Power Corp.*, 145 F.3d 1283, 1287 n.** (11th Cir. 1998); *Stewart v. KHD Deutz of Am. Corp.*, 75 F.3d 1522, 1527 (11th Cir.), *cert. denied*, 519 U.S. 930, 117 S.Ct. 300, 136 L.Ed.2d 218 (1996); *Blake v. Unionmutual Stock Life Ins. Co. of Am.*, 906 F.2d 1525, 1526 (11th Cir. 1990); *Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620, 623 (11th Cir. 1987) (holding that no right to a jury trial exists under ERISA); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1566-67 (11th Cir. 1987) (stating that the former Fifth Circuit squarely held that plaintiffs in actions under 29 U.S.C.A. § 1132(a)(1)(B) are not entitled to trial by jury). Thus, because all of Plaintiff's remaining claims are brought pursuant to ERISA, he is not entitled to a trial by jury.

## CONCLUSION

For the foregoing reasons, the parties' motions to strike certain affidavits (Doc. No. 39 & No. 43) are **DENIED**. Defendant's motion for summary judgment (Doc. No. 14) is **GRANTED IN PART and DENIED IN PART**. Specifically, Defendant's motion for summary judgment on Plaintiff's state law claims is **GRANTED**. Defendant's motion for summary judgment on Plaintiff's ERISA claims is **DENIED**. Defendant's motion to strike Plaintiff's jury demand (Doc. No. 14) is **GRANTED**.

**SO ORDERED**, this 13 day of August 2007.

/s/ Honorable Lisa Godbey Wood
JUDGE, UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

124

(2)

No. 08-953

FILED
MAR 27 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In the Supreme Court of the United States

TERRANCE ROLLAND,

*Petitioner,*

vs.

TEXTRON INC.,

*Respondent.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

## BRIEF IN OPPOSITION

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March 27, 2009

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in affirming the District Court's decision to strike Terrance Rolland's jury trial demand for his 29 U.S.C. § 1132(a)(1) and (3) claims?

2. Whether the Eleventh Circuit erred in affirming the District Court's decision that Terrance Rolland's state law fraud claim, which was preempted by ERISA, should not be reinstated after he failed to prove his ERISA claim?

## CERTIFICATE OF CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6 the following is Respondent's Corporate Disclosure Statement.

Corporate Disclosure Statement

Textron does not have a parent corporation. A publicly-held corporation does not own more than ten percent (10%) of Textron's stock.

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## BRIEF IN OPPOSITION

## STATUTORY PROVISIONS INVOLVED

Question 1 involves the application of the Seventh Amendment to the Constitution of the United States, which reads in pertinent part as follows, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

Questions 1 and 2 involve the application of 29 U.S.C. § 1132(a)(1)-(3), a portion of the Employee Retirement Income Security Act ("ERISA"), which reads:

> (a) Persons empowered to bring a civil action
> A civil action may be brought –
> (1) by a participant or beneficiary –
> (A) for the relief provided for in subsection (c) of this section, or
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
> (3) by a participant, beneficiary, or fiduciary;

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
> (B) to obtain other appropriate equitable relief
> (i) to redress such violations or
> (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

Question 2 also involves the construction of 29 U.S.C. § 1144(a), a portion of ERISA, which reads:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title . . . .

## STATEMENT OF THE CASE

Petitioner, Terrance Rolland ("Rolland"), was a former hourly employee of Respondent, Textron Inc. ("Textron"). On about February 22, 2005, Rolland initiated this action in the United States District Court for the Southern District of Georgia. Rolland claimed coverage under Textron's long-term disability plan ("Plan") and/or Textron misrepresented to Rolland that he was covered by the Plan. The Plan is a fully-insured plan. (Pet. App. 7.) Rolland pled his causes of action under both the Employee Retirement Income Security Act, 29 U.S.C. § 1001 (2006)("ERISA"), and Georgia state law.

On August 13, 2007, the District Court ruled on Textron's Motion for Summary Judgment and Motion to Strike Jury Demand. Rolland conceded his state law claims were preempted by ERISA and the District Court so concluded. (Pet. App. 53-54.) The District Court also granted Textron's Motion to Strike Rolland's Jury Demand. (Pet. App. 57.) Last, the District Court found a material factual issue existed as to whether Textron intentionally or fraudulently misrepresented to Rolland that he was covered by the Plan. (Pet. App. 56-57.)

The District Court held a bench trial on February 12 and 13, 2008, on Rolland's remaining

ERISA breach of fiduciary duty claim. On March 31, 2008, the District Court issued its decision concluding, among other things, that Textron was not acting as an ERISA "fiduciary" vis-à-vis Rolland with respect to the Plan. (Pet. App. 32-34.) The District Court also found that even if Textron was acting as an ERISA fiduciary, Textron's representations were not intended to deceive Rolland and Rolland did not reasonably rely thereon. (Pet. App. 34-39.) The District Court also concluded that even if: (a) Textron was acting as an ERISA fiduciary; (b) Textron had intentionally deceived Rolland; and, (c) Rolland reasonably relied thereon, he still would not have been entitled to benefits under Plan. (Pet. App. 39-42.) Rolland did not request the District Court to reinstate his preempted state law fraud claim.

On about April 22, 2008, Rolland appealed the District Court's decision to the United States Court of Appeals for the Eleventh Circuit. On January 2, 2009, the Eleventh Circuit issued a *per curium* decision denying, among other things, the two questions Plaintiff has presented to this Court for review. (Pet. App. 1-3.)

## REASONS FOR DENYING THE WRIT

### I. The Eleventh Circuit's Decision that Rolland is not Entitled to a Jury Trial Under ERISA does not Warrant Review by this Court.

Rolland's jury trial question does not warrant review because the Eleventh Circuit's decision is consistent with the unanimous appellate case law, the Seventh Amendment test and this Court's decision in *Great-West & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

#### A. The Eleventh Circuit's Decision is Entirely Consistent with the Unanimous Appellate Case Law and Decisions of this Court.

Although not dispositive, petitions are generally granted only for the compelling reasons set forth in Rule 10 of the Supreme Court Rules. Rolland's entitlement to a jury trial for his ERISA claims does not satisfy any of the standards.

ERISA's causes of action are set forth in § 1132(a)(1)-(6). At best, Rolland was a "participant" under the Plan. (Pet. App. 55-56.) Participants only have standing to sue under § 1132(a)(1)-(3). § 1132(a)(2) does not apply to Rolland's cause(s) of action because, among other things, he did not attempt to recover plan assets. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. _____, 128 S.Ct.

1020, 1026 (2008); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985). Thus, Rolland's claim and petition should only be analyzed under § 1132(a)(1) or (3).

Although this Court has not specifically decided whether jury trials are available under these two sections of ERISA, the Courts of Appeals have unanimously concluded that jury trials are generally not available under § 1132 and, in particular, § 1132(a)(1) or (3).[1] Rolland does not cite any contrary appellate case law.

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[1] *Hampers v. W.R. Grace & Co., Inc.*, 202 F.3d 44, 54 (1st Cir. 2000)(holding district court did not err in denying jury trial demand); *Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 568 (2d Cir. 1998)(holding no right to jury trial for § 1132(a)(1)(B) claims); *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1258-59 (2d Cir. 1996)(holding no right to jury trial for § 1132(a)(1)(B) or (a)(3) claims); *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 648-50 (3d Cir. 1990)(holding no right to jury trial for § 1132(a)(1)(B) or (a)(3) claims); *Phelps v. C.T. Enters., Inc.*, 394 F.3d 213, 222 (4th Cir. 2005)(holding no right to jury trial for § 1132(a)(1)(B) or (a)(3) claims); *Provident Life & Accident Ins. Co., v. Sharpless*, 364 F.3d 634, 640 (5th Cir. 2004)(holding no right to jury trial in ERISA equitable actions); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994)(holding ERISA claims do not entitle a plaintiff to a jury trial); *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980)(holding no right to jury trial for § 1132(a)(1)(B) or (a)(3) claims); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 616 (6th Cir. 1998)(holding no right to jury trial for § 1132(a)(1)(B) or (a)(3) claims); *McDougall v. Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 576 (7th Cir. 2007)(holding general rule in ERISA cases is that there is no right to a jury trial because ERISA's antecedents are equitable, not legal); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466-68

Moreover, this Court has denied similar petitions for certiorari on at least three occasions: *McDougall v. Pioneer Ranch Ltd. Partnership*, 494 F.3d 571, 576 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 884 (2008); *Langlie v. Onan Corp.*, 192 F.3d 1137, 1141 (8th Cir. 1999), *cert. denied*, 529 U.S. 1087 (2000); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995); and, more likely, on seven occasions: *Tischman v. ITT/Sheraton Corp.*, 145 F.3d 561, 568 (2d Cir. 1998), *cert. denied*, 525 U.S. 963 (1998); *Mathews v.*

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(7th Cir. 1998)(holding general rule in ERISA cases is that there is no right to a jury trial because ERISA's antecedents are equitable, not legal); *Wardle v. Cent. States Se. & Sw. Areas Pension Fund*, 627 F.2d 820, 827-30 (7th Cir. 1980)(holding no right to jury trial for § 1132(a)(1)(B) claims); *Langlie v. Onan Corp.*, 192 F.3d 1137, 1141 (8th Cir. 1999)(holding there is no right to a jury trial under ERISA); *In re Vorpahl*, 695 F.2d 318, 321 (8th Cir. 1982)(holding no right to jury trial for § 1132(a)(1)(B) or (a)(3) claims); *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 996-97 (9th Cir. 2000)(holding no right to jury trial for § 1132(a)(1)(B) or (a)(3) claims); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1162 (10th Cir. 1998)(holding no right to jury trial for § 1132(a)(1)(B) claims); *Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822, 830 (10th Cir. 1995)(affirming district court's decision to deny jury trial on ERISA claims); *Broaddus v. Fla. Power Corp.*, 145 F.3d 1283, 1287 n.** (11th Cir. 1998)(holding district court did not err in striking jury demand on ERISA claims because relief under ERISA is limited to equitable remedies); *Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620, 623 (11th Cir. 1987)(holding no right to jury trial for under § 1132(a)(1)(B) or (a)(3) claims); *Howard v. Parisian Inc.*, 807 F.2d 1560, 1567 (11th Cir. 1987)(holding no right to jury trial for § 1132(a)(1)(B) claims).

*Sears Pension Plan*, 144 F.3d 461, 466-68 (7th Cir. 1998), *cert. denied*, 525 U.S. 1054 (1998); *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 648-50 (3d Cir. 1990), *cert. denied*, 498 U.S. 811 (1990); *Wardle v. Central States Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 827-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). As indicated above, the appellate case law has not shifted since this Court denied the foregoing petitions.[2]

Based upon the unanimity of the Courts of Appeals and the previous decisions of this Court, no compelling reason exists to grant review of Question No. 1 of the Petition.

### B. In Addition, or in the Alternative, the Eleventh Circuit's Decision is Consistent with this Court's Test for a Jury Trial Under the Seventh Amendment.

Even if this Court were to review Question No. 1, it would still conclude that jury trials are unavailable for § 1132(a)(1) or (3) claims. Jury trials are generally available for legal, but not equitable, claims. In determining whether a jury trial is available under the Seventh Amendment for statutory claims, this Court looks to Congressional

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[2] In addition, the relevant text of ERISA has not changed since its enactment some thirty-five years ago.

intent. Since ERISA is silent as to jury trials, the Congressional intent is not apparent. Therefore, the next step is to examine how similar actions were treated before the merger of courts and whether the remedy sought is legal or equitable in nature. The second inquiry -nature of the remedy- is the most important. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

Importantly, the text of § 1132(a)(3) explicitly provides for only injunctive and "other appropriate, equitable relief." This Court has repeatedly indicated that § 1132(a)(3) only permits equitable relief. *Great-West* at 210-12; *see also Aetna Health, Inc. v. Davila*; 542 U.S. 200, 215 (2004); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-59 (1993).

Assuming a breach of fiduciary duty claim is available under § 1132(a)(1), such claims are historically equitable in nature. A participant may only recover benefits, and enforce and clarify rights under an ERISA plan. These remedies are quintessentially equitable in nature. *Russell*, 473 U.S. at 144; *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 996-97 (9th Cir. 2000); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1162 (10th Cir. 1998); *DeFelice v. Am. Int'l Life Assurance Co. of N.Y.*, 112 F.3d 61, 64-65 (2d Cir. 1997); *Blake v. Unionmutual Stock Life Ins. Co. of Am.*, 906 F.2d 1525, 1526-27 (11th Cir. 1990). In fact, Rolland seems to concede that § 1132(a)(1) actions are equitable. (Pet. 5-6.)

Based upon the foregoing, the Seventh Amendment does not compel a right to a jury trial for § 1132(a)(1) or (3) claims.[3] Thus, Question No. 1 does not warrant review by this Court.

### C. *Great-West* does not Compel a Review of the Eleventh Circuit's Decision.

Rolland argues the Court's *Great-West* decision supports the right to a jury trial under ERISA. Rather, *Great-West* actually supports Textron's position. First, *Great-West* did not even remotely address jury trials under ERISA. *Great-West* involved an insurer's contractual indemnity claim under § 1132(a)(3) against the beneficiary for reimbursement of medical expenses paid to the beneficiary by a third-party. *Id.* at 207. This Court reiterated several important ERISA principles. It stated:

> We have observed repeatedly that ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system. We have therefrom been especially

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[3] Petitioner's partial quote of Justice Scalia's concurrence in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 730-31 (1999) is misleading. The quoted section simply illustrates the decision's focus that all Section 1983 actions are tort-based regardless of various alternative theories or remedies, and thus, a jury trial is available.

> reluctant to tamper with the enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text. Indeed, we have noted that ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.

*Id.* at 209 (citations and quotations omitted).

*Great-West* then reiterated that § 1132(a)(3) only permits "equitable relief." *Id.* at 210. The *Great-West* Court also confirmed that *Mertens* stands for the proposition that "equitable relief means something less than all relief and the term equitable relief in § 1132(a)(3) must refer to the categories of relief that were typically available in courts of equity." *Mertens*, 508 U.S. at 255-56. *Great-West* concluded the claim was a contractual, or legal, claim, which could not be pursued under § 1132(a)(3). *Great-West* can not be reasonably interpreted to stand for the proposition that if Rolland characterizes his remedy as a legal remedy, he somehow is entitled to a jury trial under a statute that authorizes only equitable relief. In fact, most lower courts have recently (and soundly) rejected Rolland's proposed interpretation of *Great-West*. *Beesley v. Int'l Paper Co.*, No. 06-703 DRH, 2009 WL 260782, at *5 (S.D. Ill. Feb. 2, 2009); *George v. Kraft Foods Global, Inc.*, Nos. 07C 1713, 07C 1954, 2008

WL 780629, at *3 (N.D. Ill. Mar. 20, 2008); *Fowler v. Aetna Life Ins. Co.*, No. C08-03463 WHA, 2008 WL 4911172, at *5 (N.D. Cal. Nov. 13, 2008); *Graham v. Hartford Life & Acc. Ins. Co.*, No. 03-CV-0144-CVE-SAJ, 2008 WL 4826314, at *3 (N.D. Okla. Oct. 29, 2008).

Based on the foregoing, *Great-West* does not warrant a review of Question No. 1.

## II. The Eleventh Circuit's Decision that Rolland's Preempted State Law Fraud Claim Should not be Reinstated Upon a Failure to Prove His ERISA Claim does not Warrant Review by this Court.

Rolland requests this Court to review whether his preempted state law fraud claim(s) should be reinstated after he failed to prove several elements of his ERISA claims(s). In essence, Plaintiff requests this Court to declare that if an ERISA claim is unsuccessful on the facts, his well-pleaded state law claim(s) is no longer preempted by ERISA. The Court should deny Rolland's request because: he has waived his rights to review; the request would eviscerate the law of ERISA preemption; it represents nothing more than a thinly veiled attempt at a second bite at the apple which would ultimately fail; and, would promote judicial inefficiency.

### A. Rolland Waived his Right of Review.

Rolland failed to preserve Question No. 2 before the District Court. A petitioner must properly preserve an argument before the district court. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404-05 (2006); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1356 (11th Cir. 2007); *Millennium Partners, L.P. v. Colar Storage, LLC*, 494 F.3d 1293, 1304 (11th Cir. 2007). At summary judgment, Rolland conceded his state law fraud claims(s) were preempted and those claims were dismissed. Thereafter, Rolland did not seek, either at trial or subsequently through post-trial motions under the Fed. R. Civ. P. 52(b) or 59, to have his state law fraud claims(s) reinstated. Rolland's inaction should bar any consideration of the issue. *Unitherm*, 546 U.S. at 404-05; *McMahon*, 502 F.3d at 1356; *Millennium*, 494 F.3d at 1304.

### B. Rolland Impermissibly Requests this Court to Re-Write 29 U.S.C. § 1144(a).

Rolland attempts a two-prong approach to, *post hoc*, escape ERISA (the very statute under which he decided to sue Textron). First, Rolland inappropriately seeks to re-characterize and re-focus ERISA's preemption analysis on whether a plaintiff

can be successful, at the outset, under § 1132(a), and if not, his well-pleaded complaint should proceed under state law. Second, Rolland incorrectly claims Textron was immune from liability under ERISA solely because the District Court found it was not acting in a fiduciary capacity.

Rolland requests this Court to reverse and re-write ERISA preemption case law and § 1144. Rolland's proposed methodology is to consider each alleged injury (a lack of disability coverage) as being caused by another's alleged illegal act (Textron's misrepresentations) from which the law must provide a cause of action and correspondingly sufficient remedy(ies). When, in Rolland's view, he is faced with the proverbial square peg and round hole, he requests this Court to re-write decades of ERISA preemption case law so he can proceed with a second lawsuit after failing to prove multiple elements of his ERISA claim(s). Rolland's approach is inappropriate. ERISA preemption looks broadly at the nature of the claim, not whether a specific defendant may have a defense.

ERISA's preemptive scope is intentionally broad and has been described as follows:

> The breadth of [§ 1144(a)'s] pre-emptive reach is apparent from the section's language. A law relates to an employee benefit plan, in the normal sense of the phrase, if it has a

> connection with or reference to such a plan. . . . We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning. . . .
>
> In fact, however, Congress used the words relate to in [§ 1144(a)] in their broad sense. To interpret [§ 1144(a)] to preempt only state laws specifically designed to affect employee benefit plans would ignore the remainder of [§ 1144]. . . .
>
> Nor, given the legislative history, can [§ 1144(a)] be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA-reporting, disclosure, fiduciary responsibility, and the like. The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.

*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983)(citations and quotations omitted); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). ERISA's preemptive effect is so broad it converts state law claims into federal claims under the well-pleaded complaint rule. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987).

In *Aetna Health, Inc. v. Davila*, this Court summarized the interface of ERISA preemption and the remedial scheme under § 1132(a) as follows:

> The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions, which are intended to ensure that employee benefit plan regulation would be exclusively a federal concern.
>
> ERISA's comprehensive legislative scheme includes an integrated system of procedures for enforcement. This integrated enforcement mechanism is a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans. As the Court said:
>
> The detailed previsions of [§ 1132(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under the state law that Congress rejected in ERISA. The six carefully integrated civil enforcement provisions found

> in [§ 1132(a)] of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.
>
> Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.

542 U.S. at 208-09 (citations and quotations omitted).

Rolland sought coverage/benefits under the Plan and/or money for the value of the Plan benefits. There is no doubt Textron's fully-insured plan is an ERISA welfare plan under § 1002(1). Certainly, Rolland's state law claim(s) squarely duplicates, supplements and/or supplants § 1132(a)(1) and/or (3). In fact, Rolland did not even attempt to fully mask his ERISA claim(s) in a well-pleaded complaint. Rather, Rolland specifically pled alternative state law and ERISA causes of action based upon the exact same facts. Rolland's claims also require the District Court to apply and interpret the Plan. (Pet. App. 39-42.) As a result, ERISA is Rolland's exclusive remedy. *Davila*, 542 U.S. at 208-11; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 457 (3d Cir. 2003); *Rego v. Westvaco Corp.*, 319 F.3d 140, 148 (4th

Cir. 2003); *Hampers v. W.R. Grace & Co., Inc.*, 202 F.3d 44, 51 (1st Cir. 2000); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 756-58 (5th Cir. 1990).

As indicated, § 1132(a) represents a legislative compromise and a cause of action and full array of remedies may not exist for every alleged wrong. Properly relying upon *Great-West* and *Mertens*, several lower courts have recognized, and refused to alter, these alleged "gaps" in ERISA's enforcement scheme so the preempted state law claims have a corresponding ERISA cause of action and remedy. *Amschwand v. Spherion Corp.*, 505 F.3d 342, 348 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 2995 (2008); *see also Goeres v. Charles Schwab & Co.*, 220 F. App'x 663 (9th Cir. 2007), *cert. denied*, 128 St.Ct. 2994 (2008); *Alexander v. Bosch Auto. Sys.*, 232 F. App'x 491, 496-99 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 2995 (2008); *Hampers*, 202 F.3d at 51; *Smith*, 959 F.2d at 11; *Rego*, 319 F.3d at 148; *Lee*, 894 F.2d at 756-58. These courts have properly concluded that Congress, not the courts, are charged with modifying ERISA's text. Similarly, Question No. 2 does not warrant review by this Court because to the extent Rolland is without a corresponding ERISA action or remedy for his preempted state law claim, Congress is responsible for revising ERISA.

### C. Rolland was not without an ERISA Cause of Action or Remedy.

Even if the Court was inclined to fill in ERISA's alleged "gaps", this case does not present a situation in which Rolland, contrary to his assertions, was without an ERISA cause of action or potential remedy. Textron was not simply "exempted" or "immune" from ERISA solely because the District Court properly concluded Textron was not acting as an ERISA fiduciary.

The District Court specifically and fully analyzed Rolland's ERISA fraud/breach of fiduciary duty claim. (Pet. App. 31-36.) However, Rolland simply failed to present sufficient evidence to prove several other elements of his ERISA claim, apart from Textron's fiduciary status. The District Court concluded, among other things, Textron did not intentionally deceive the Rolland and Rolland did not reasonably rely upon Textron's representations.[4] Last, the District Court concluded that even if it awarded Rolland coverage under the Plan and/or were to analyze the measure of Rolland's damages, he would not have qualified for benefits under the Plan. Hence, Rolland suffered no damages. Intent to deceive, reasonable reliance and damages are essential elements of all fraud/intentional

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[4] In fact, the District Court basically found Petitioner fabricated this entire case. (Pet. App. 38-39.)

misrepresentation types of claims, whether grounded in ERISA, other statutes or common law. Therefore, even if this Court was inclined to revise or expand § 1132(a), this case presents an inappropriate vehicle because, on the evidence adduced, Rolland's claims would still fail.

### D. Rolland's Position Promotes Judicial Inefficiencies.

Judicial economy is an important tenet of American jurisprudence. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 352-53 (1988); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). Allowing Rolland to reinstate state law fraud claim(s) after failing to prove his preempted ERISA claim(s) would substantially undermine judicial economies. In essence, ERISA defendants would face two trials – an ERISA bench trial in federal court and then a state law jury trial in either state or federal court. Such a procedure is not desirable public policy and undermines the notion of one civil trial for each alleged wrong. *Cohill*, 484 U.S. at 352; *Gibbs*, 383 U.S. at 726. Thus, Question No. 2 does not warrant consideration by this Court.

## CONCLUSION

For the foregoing reasons, Rolland's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 08-953

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In The

# Supreme Court of the United States

TERRANCE ROLLAND,

*Petitioner,*

vs.

TEXTRON, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF BY PETITIONER

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The only matter raised in Respondent's brief that requires reply is its assertion at page 13 that Petitioner failed in the district court properly to preserve his Question 2 sought to be presented in this Court. This is Petitioner's contention that, if Respondent's misrepresentations to him were not made in its fiduciary capacity, his state law fraud claim against Respondent is not preempted.

The opinion of the Court of Appeals below addressed Petitioner's Question 2 on the merits and gave no attention at all to any supposed waiver of this legal argument by Petitioner. The Record does not support Respondent's claim (page 13 of its brief in this Court) that "[a]t summary judgment Rolland [Petitioner] conceded his state law fraud claims were preempted." In the interest of both efficiency and candor with the district court, Petitioner has always acknowledged that, if he has a claim for misrepresentation by an ERISA fiduciary, he cannot also have a state law claim for the same wrong. In no way has Petitioner conceded that, if ERISA does not even cover Respondent's misrepresentation, because Respondent did not act as a fiduciary in defrauding Petitioner, still ERISA preempts his state law remedy. Were there even a colorable argument that he had done so, one would have expected that the Court of Appeals would at least have adverted to it.

The district court dismissed Rolland's state law fraud claim on summary judgment, on the basis of what it considered to be binding precedent, as a matter of law. It would have been improper for Rolland to have

tried to raise this issue subsequently at trial or through Rules 52(b) or 59, Federal Rules of Civil Procedure, as Respondent now claims to think Petitioner should have done. Neither of these rules is applicable to a question of law such as presented here.

To speak frankly, Petitioner is unable to understand Respondent's contention in this regard. Two of the three cases cited by Respondent have nothing to do with post-judgment motions of any kind, so far as Petitioner can see. The third, *Unitherm Food System, Inc. v. Swift-Eckrich, Inc,* 546 U.S. 394 (2006), addresses whether a motion based on insufficiency of evidence must be renewed after judgment in order to preserve such insufficiency as an appeal issue, a question which has nothing to do with anything involved in the present action.

Respectfully submitted,

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